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91
REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

DURING THE

**OCTOBER TERM, 1887, MARCH TERM, 1888, AND
OCTOBER TERM, 1888.**

W. H. HOLMES,
REPORTER.

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JUSTICES
OF
THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

WILLIAM P. LORD, Chief Justice until July, 1888.
WILLIAM WALLACE THAYER, Associate Justice.
REUBEN S. STRAHAN, Associate Justice.

W. H. HOLMES, Clerk.

WILLIAM WALLACE THAYER, Chief Justice after July, 1888.
REUBEN S. STRAHAN, Associate Justice.
WILLIAM P. LORD, Associate Justice.

W. H. HOLMES, Clerk.



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OCTOBER TERM, 1887.



CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

OREGON.

OCTOBER TERM, 1887.

[Filed January 16, 1888.]

**JAMES SHIRLEY, APPELLANT, v. H. C. BIRCH
ET AL., RESPONDENTS.**

16	1
20	122
18*	344
25*	381

PRACTICE—APPEAL—NOTICE OF—BY WHOM SIGNED.—A notice of appeal is sufficient, although signed by attorneys who were not the attorneys of the appellant in the court below, and no substitution has been made in the manner provided in sections 1010 and 1011 of the Civil Code.

16	1
24	181
18*	344
33*	402

APPEAL—ADVERSE PARTY—WHO IS NOT.—M., an intervenor in the suit for foreclosure, having entered into a stipulation which precluded him from being heard until the practical determination of the issues of the case and the sale of the mortgaged property, has no such standing in the case as requires him to be made a party to the appeal under section 526 of the Code.

APPEAL—NOTICE OF—SERVICE UPON PARTNERS.—Service of notice of appeal upon one of two persons, who appear in the suit as partners, is service upon the firm.

APPEAL from Yamhill County. Motion to dismiss appeal denied.

N. B. Knight, and J. J. Murphy, for Appellant.

Ramsey & Bingham, for D. B. Gaunt.

Lord & Kaiser, for F. N. Gilbert and M. E. Campbell.

Opinion of the Court—Thayer, J.

THAYER, J.—The transcript in this case, having been filed in this court, the attorneys for the respondents submitted a motion to dismiss the appeal upon several grounds, which I will proceed to notice. The first ground is that the notice of appeal is not signed by the appellant's attorneys in the court below, but purports to have been signed by Messrs. Murphy and Knight, who were not his attorneys of record in the court below. The respondent's counsel contend that a notice of appeal from a judgment or decree of a Circuit Court to this court must be signed by the attorneys for the appellant in the former court, or by attorneys substituted for them in the manner provided in the Civil Code of the State; otherwise the appeal will not be regularly brought, and be subject to dismissal upon motion of the respondents. They have not cited any provision of the Code authorizing any such disposition of an appeal, but rely wholly upon decisions construing the Code, and similar provisions of the Code of California to that effect.

The only decision in this State giving such construction is in the case of *Poppleton v. Nelson*, 10 Or. 437. In that case this court held that where the record showed that the appellant appeared in the suit in the court below by attorneys, who there represented him until the final decree was entered against him, and without any change of attorneys upon the record attempted to give notice of an appeal on his own behalf and in his own name, the respondent was not bound to recognize him, nor under any necessity of noticing any written proceedings not coming from or in the name of his attorneys of record, and thereupon dismissed the appeal. The decision was based upon the provision of the Code, to the effect that an action, suit, or proceeding may be prosecuted or defended by a party in person, or by attorneys, and that where a party appears by attorney the written proceedings must be in the name of the attorney, who is the sole representative of his client, as between him and the adverse party, except where the attorney only appears as counsel. (§ 1010 of the Civil Code, as published in 1874.)

The rule indicated without doubt is correct, so far as applied to the action, suit, or proceeding in which the attorney is

employed. When a party to a suit chooses to be represented by attorney therein, and retains one for that purpose, and the attorney, in pursuance of such retainer, appears for the party in the suit, the latter has no right afterwards, unless a change is made as provided in sections 1010 and 1011 of the Civil Code to appear therein. He thereby substitutes the attorney in his place, stead, and turn to attend to the matters involved, and any attempt upon his part thereafter to conduct the proceedings in person would be an unwarranted interference therewith; nor has the opposite party any right to treat with him in regard to the matter, but is bound to recognize the attorney as having the management and control of the affair. Every notice in the proceedings of the case required by the rules of practice to be served upon the adverse party must be served upon the attorney, if he resides in the county where the suit is pending, instead of the party. The statute permits the service to be made upon the latter, where his attorney resides in a county other than that in which the venue is laid, as a matter of convenience. I would have supposed, to the adverse party. But this court has given the provision upon that subject a different construction—has construed it as a requirement that the service in such case *shall* be made upon the party, and *not* upon the attorney. I never supposed that the legislature intended any such meaning; but it has been held so often that such is its construction that it would be impolitic to attempt to change it. Whether the employment of an attorney, however, extends to the appeal from the decree to this court, I am not so well satisfied. It occurs to me that when the proceedings in the lower court culminate in a final decree against the party, that the duty of the attorney is about ended. His retainer is to defend against the suit, and when that is determined against his client, his relation terminates, at least it continues to exist only as to incidental matters connected with the litigation.

There is no provision in the Code by which the attorney, in an action, suit, or proceeding, may be changed after judgment or decree or final determination. The language of the Code is: "The attorney in an action, suit, or proceeding may be changed

Opinion of the Court—Thayer, J

at any time *before* judgment or decree or final determination." (§ 1010, Code of 1874.) The words "action," "suit," or "proceeding" are referred to distributively in the section. Each has its peculiar meaning, and the words "judgment," "decree," and "determination" apply severally to each. Thus judgment is the final result of "action," decree of "suit," and determination of "proceeding," as used in the section. The attorneys for the appellant in the Circuit Court were attorneys in a suit. If a change, therefore, had been necessary in order to have his present attorneys, Messrs. Murphy and Knight, take the appeal from the decree to this court, under the wording of said section of the Code, he would have been compelled to have had it made before the decree was rendered, and he probably did not then know that he would require their services.

The position of the respondents' counsel is that an appeal from a judgment in an action or a decree in a suit is but a continuance of the action or suit, and that the appellant's employment of Dawn and others, as attorneys in the suit in the Circuit Court, was an enlistment of their services for the entire litigation, unless a change was made as provided in said sections 1010 and 1011 of the Code, which, as we have seen, only authorized the change to be made *before* the decree, and necessarily before the appellant could have known whether or not he would have any litigation of the matter in this court. Such a view cannot be maintained from a common-sense standpoint. An appeal from the Circuit to the Supreme Court must be regarded as a new proceeding.

The Constitution of this State only vests this court with jurisdiction to revise the *final* decisions of the Circuit Courts. (§ 5, art. vii. Const. A.) Finality must be put to the suit by the Circuit Court before an attempt can properly be made to have the decision therein revised here. And the review by this court of such decision, whether it be had upon exception taken at the trial or hearing in the Circuit Court, or upon facts found by that court, or which come here by the depositions of witnesses, is for the purpose of determining whether the decision is erroneous or not; and if found to be so, either in actions at law or

in suits in equity, when tried by the court, the judgment or decision is reversed and the case remanded for a new trial; or if found to be erroneous as to findings of facts this court will adjudge what decree should be given, and remand the case, with directions that it be entered as the decree of that court. Commencing an action or suit in a Circuit Court, and conducting it to a final termination there, and taking an appeal to review a judgment or decree in this court, are distinct proceedings. The first one is to recover a judgment or decree. The second one is to revise a judgment or decree. The latter proceeding combines the nature of both appeal and writ of error as heretofore known; but in its operation and effect is more in the nature of the latter than of the former. Its office is to correct errors, including both errors of law and findings of fact.

A writ of error was always regarded as a new proceeding. (*Bendernagle v. Cocks*, 19 Wend. 152; *Weeks on Attorneys*, § 253.) And it was held in chancery that another solicitor than the one who commenced the suit could be employed to take an appeal from the decree of the vice-chancellor to the chancellor without any order of substitution. (*McLaren v. Charrier*, 5 Paige, 530, 534.) The court in *Poppleton v. Nelson*, 12 Or. 349, must have regarded the appeal as a continuation of the suit and placed its decision upon that ground. The reason it gave why an attorney of record had authority to give a notice of appeal seems to have been put upon the ground that a notice of appeal could be served upon him, at least I infer that from the language of the opinion, as follows: "This court has repeatedly held that the notice of appeal may be served upon the attorneys of record residing in the county where the action is pending under section 521." (Citing *Lindley v. Wallis*, 2 Or. 203; *Rees v. Rees*, 7 Or. 78.) "Now if the attorney of record may be served with a notice of appeal, his authority to give one should not be denied. Both are based upon the proposition that he represented his client in the proceeding to appeal. This principle seems clearly involved in and established by these decisions." This reasoning is not at all satisfactory to my mind. The Code by authorizing the service of the notice of appeal upon the attorney of record,

if it does authorize any such service, does not necessarily authorize the attorney of record to give a notice of appeal.

The Code might have authorized the notice of appeal in such case to be served upon the clerk of the court, but that would not have given the clerk authority to give a notice of appeal. In *Lindley v. Wallis*, cited by the court, several rules seem to have been laid down, the fourth one of which is that "the service of notice of appeal may be made either upon the party or upon his attorney of record residing within the county where the trial was had." Outside of the county the service can only be made upon the party. And in *Rees v. Rees*, *supra*, that rule is affirmed. It might, therefore, under the same logic adopted in *Poppleton v. Nelson*, *supra*, be said that if the party to the judgment or decree "may be served with a notice of appeal, his authority to give one should not be denied." And yet it was upon the ground that the notice of appeal was given by the party that the appeal was dismissed, although a notice of appeal under the rule referred to might have been served upon him. But the rule itself is in direct conflict with the Code.

Said section 521 says expressly that "when a party, whether absent or not from the State, has an attorney in the action or suit, service of notice or other papers shall be made upon the attorney, if he reside in the county where the action or suit is pending, instead of the party, and not otherwise." This language is made emphatic by its own terms. It requires absolutely the service to be made upon the attorney in the case mentioned, and not be served otherwise. Still the court in *Lindley v. Wallis*, in defiance of this mandatory language of the legislature, prescribed a rule that the service could be made on either attorney or party when the former resided within the county where the trial was had. No such construction can be given to said section 521. (*Tripp v. De Bow*, 5 How. Pr. 114.) The adoption of this rule, it seems to me, was a change of the terms of that section by judicial *fiat*. But however that may be, the right of the appellant to change his attorneys as a matter of course, when he appeals from a judgment or decree, has no connection with the fact that service of a notice of appeal may be made upon the

attorneys of record. That was the practice in the service of citation when a writ of error was sued out.

Johnson, J., in delivering the opinion of the court in *Tripp v. De Bow*, *supra*, says: "It seems clear from this view of the practice, not only before but since the Revised Statutes, that the attorney of record was always regarded as the attorney in the action, for the purposes of notice of a writ of error or appeal, until changed by the party and due notice given, which change might, however, be effected without any application to the court." According to the view here indicated, the court, in *Poppleton v. Nelson*, mistook the law. But it must, as a matter of justice to the learned gentlemen who were judges of the court at the time that the decision was made, be conceded that the decision in *Day v. Holland*, decided at the present term of this court, has materially influenced the view expressed.

The language of the last paragraph of section 505, Code of 1874, that "an action or suit is deemed to be pending from the commencement thereof until its final determination upon appeal, or until the expiration of the period allowed to take an appeal," taken literally, renders an appeal but a continuance of the action or suit in which the judgment or decree appealed from was recovered. And it was claimed in the last-mentioned case, that said provision of the Code prevented the judgment or decree from being *res adjudicata* until the period therein mentioned had elapsed, and that the appeal opened up the whole matter.

A majority of this court were of opinion that the provision was not intended to mean what its literal sense would seem to indicate, that the final judgment or decree appealed from remained intact until reversed or modified by this court, during which time it would be conclusive in collateral proceedings of its own rectitude, the same as though no appeal had been taken. The majority of the court concluded that the action or suit in such a case might be deemed to be pending for some purposes, but not in the sense which the literal language of the provision would imply, nor for any other than incidental purposes, such as the substitution of new parties, the issuance of execution, satisfaction of judgment, or service of papers, and matters of like character,

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and not that the judgment was not a finality until annulled or reversed on appeal. The Code of the State of California contains the same provision of statute as the one here set out, and the courts of that State have given it a more enlarged meaning than this court has been inclined to give it. The result is that there will probably be found a difference in the adjudication of the courts of the two States upon subjects where the said provision has a bearing. We have been referred to the case of *Hobbs v. Duff*, 43 Cal. 491, and some of the other cases from that State, which hold in effect the same as was held in *Poppleton v. Nelson*, *supra*, but we are inclined to ascribe the holding as being influenced much by said provision of the Code; and besides there does not seem to have been a complete unanimity in the views expressed by the judges of that State upon the question.

I notice in *McDonald v. McConkey*, 54 Cal. 144, that Judge Thornton used this language: "We are inclined to the opinion that Mr. Griffith was competent to give the notice and to take an appeal in the cause, for the reason that an appeal like a writ of error is a new proceeding, and that the party to the action has full power to constitute an attorney to take and prosecute the appeal, other than the attorney of record, in the court below. But waiving this question, which we do not intend to decide, we think the attorney for the respondent admitted the competency of Griffith by joining in the certificate referred to, and thus waived the right to object to his competency in the mode which he has adopted." Counsel for the respondent has also called our attention to *Schuler v. Maxwell*, 45 N. Y. Sup. Ct. 240. That case seems also to favor their side of the question; but it will be observed that the appeal there was from an order made at a special term of the Supreme Court of that State to the general term of the same court. The court held that an appeal from a judgment could not be taken by a new attorney without substitution, and seems to have placed its decision on similar grounds to that in *Poppleton v. Nelson*, *supra*, that as the notice of appeal from a judgment was to be served upon the attorney for the adverse party if he were living in the county, it followed that

the power of the attorney to receive a notice of appeal extended beyond the judgment, and that by analogy, the power to serve a notice of appeal should extend in like manner.

The court seemed to consider that the principle was stronger when the appeal was to the general term of the Supreme Court, than it would be if it had been to the court of appeals; but that in view of rule 4 of the latter court, which provides that the attorneys, etc., of the respective parties should be deemed the attorneys, etc., in that court, until others were appointed and notice thereof given, the appeal, if it had been to that court, would not have been well taken. The decisions of the California and New York courts upon the question are of but little practical importance, whichever way decided. They are both extremely careful not to affect the rights of a litigant. In the New York case the court used this language: "The defendant in this case was promptly notified of the defect of her notice. She might very possibly have had an amendment or have served a new notice; but she did not. . . . Nor do we decide whether or not the defendant may still amend the notice by leave. . . . The judgment in this case is stated to have been entered by the consent of all the defendants. Perhaps a valid appeal may be taken from such judgment and may be in force until dismissed." And in the California case it will be seen that the judge promptly seized upon the first pretext to hold that the respondent had waived the objections; and it appears to have been generally held there, that any acquiescence upon the part of the respondent, the receiving of the notice even without objection, would constitute a waiver of the irregularity. A motion in a New York court to dismiss an appeal in such a case, where the respondent had received and retained the notice of appeal, would be promptly denied.

It is evident that a notice of appeal has been regarded by some of the judges in those States as a mere proceeding in the case; that it is amendable by leave of the court, and its defects may be waived. But in this State it has been viewed more in the nature of process. In *Oliver v. Harvey*, 5 Or. 361, which was a motion to dismiss an appeal, the notice of which had been

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served and filed, and which the court held to be defective, but a stipulation was subsequently signed by the counsel for the respective parties continuing the cause from the August to the December term of the court, Prim, J., in delivering the opinion of the court, said: "An appeal shall be taken and perfected in the manner prescribed in this section," referring to section 527 of the Code, "and not otherwise. The appellant shall cause a notice to be served on the adverse party, and file the original with proof of service indorsed thereon with the clerk when the judgment or decree is entered. This is the only mode prescribed in which an appeal can be taken to the Supreme Court. The *service* and *filing* the *notice* of appeal is indispensable in order to enable the appellate court to obtain jurisdiction of the cause. A waiver of the filing by the stipulation of the parties is not the equivalent of the filing of the notice; for consent, though it may waive error, cannot confer jurisdiction." In *Dolph v. Nickum*, 2 Or. 202, it was held that notice of an appeal and certificate of error were not amendable. These two cases represent the general current of decisions in this State upon the subject of appeals. The mode has invariably been regarded as a distinct and independent proceeding, to bring the judgment or decree from the Circuit Court to this court in order to adjudge as to alleged errors of the former court; and to attempt to hold that it is a continuance of the action or suit in which the judgment or decree appealed from is entered, and not a new proceeding under the general view of the subject adopted by the courts of the State as appears from the adjudications, would exhibit upon our part, in my opinion, a lack of candor. The next point urged by respondent's counsel in favor of the dismissal of the appeal is, that William Miller and A. T. Gilbert, two of the defendants in the suit in which the decree was rendered, have not been served with any notice of the appeal. The rule laid down in *Poppleton v. Nelson*, *supra*, and in *Lillienthal v. Caravita*, 15 Or. 339, decided at this term of court, we consider correct upon that question. All the parties to the judgment or decree appealed from, interested in the relief sought by the appeal, must be notified regularly as required by said sec-

tion 527 of the Code. It appears from the transcript that so far as said Miller had any connection with the case, it was that of an intervenor. The suit was commenced to foreclose a mortgage upon real property, executed by the respondent H. C. Burch. The other respondents were alleged to be subsequent encumbrancers of the mortgaged premises, and were made defendants upon that ground. Miller was not made a defendant in the outset, but subsequently applied to the court to be made a defendant, upon the grounds that he was the owner of a subsequent mortgage upon the premises executed by said Burch to H. C. Wandt. The latter was made a defendant in the suit on account of the mortgage, and Miller claimed that it and the note it was given to secure had been assigned to him, and sought by his intervention in the suit to be declared to be the owner of the note and mortgage. The respondent Townsend claimed also ownership of the said note and mortgage, and was made a defendant in the suit. It appears that when Miller made his application to be made a party to the suit, a stipulation was entered into between all the parties to the suit, to the effect that Miller might file an answer at the then term of the court, setting up his claim as owner of the note and mortgage; that the allegations of the answer should be deemed denied by all the parties interested in the matter; that the case should proceed without taking any testimony at that time as to his claim, and that in case it should be ascertained after the lands described in appellant's mortgage were sold that there were any of the proceeds thereof remaining applicable to the payment of the Wandt note and mortgage, then, unless the parties claiming to own them agreed as to the ownership of such surplus funds, the court might, after hearing all proper testimony offered by the parties in interest, determine as to their ownership, and make a proper supplementary decree as to the note and mortgage and the payment of this overplus, and might in its discretion make a reference of the question to a referee, and that the ownership of said note and mortgage should not be determined until after said sale. In pursuance of which stipulation said Miller filed an answer in the case, and no further notice seems to have been

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taken of the matter. He is not mentioned in the decree, and by the terms of the stipulation under which he filed his answer has precluded himself from being heard in the case until after the sale of the mortgaged premises. He in fact has consented to abide the result of the litigation and make his claim after it is terminated, and had no such standing in the case as entitled him to be made a party to the appeal, or be served with notice of appeal. He was not in a condition to appeal from the decree, as he was not a party to it; nor do I think he was an adverse party within the meaning of the term as used in section 526 of the Code, as he was not a party to the decree; but if he were, he had put it out of his power to be an actor in the litigation until the time before referred to arrived. The point that said A. T. Gilbert was not served with notice of appeal is untenable. The sheriff of Marion County where said Gilbert resides certified in his return to the notice of appeal that he served a copy thereof upon Gilbert Brothers by delivering a true copy thereof, etc., to F. N. Gilbert in person and personally, as one of the firm of defendants, Gilbert Brothers.

Said F. N. and A. T. Gilbert were described in the pleadings and proceedings in the suit as partners under the firm name of Gilbert Brothers, and it sufficiently appears that their claim in the suit belonged to them as partners. In such case the service upon one is service upon both. (*Perrine v. Miller*, 4 N. Y. Sup. Ct. 36.) This motion does not deserve the consideration which has been given it.

The grounds upon which it is made are purely technical, neither of them affecting in the remotest degree any of the rights of the respondents. It certainly does not matter to them a particle whether the appeal was taken by the former attorneys of the appellant or the present ones, nor whether the change of attorneys was made by regular substitution upon the record or otherwise; and the persistent and untiring efforts of the respondents' counsel to induce the court to dismiss the appeal, and thereby deny the appellant a hearing in this court upon an important matter, appears to me like a deplorable waste of energy.

The motion to dismiss the appeal is denied.

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Per Curiam.

[Filed January 30, 1888.]

On application to rehear motion to dismiss appeal.

PER CURIAM.—In *Day v. Holland*, we held that a judgment or decree was binding and conclusive on parties and privies until annulled or reversed. That is the theory of law as it prevailed, and was practiced in the common-law courts. “Every judgment,” said Black, C. J., “must be conclusive until reversed. Such is the character, nature, and essence of all judgments. If it be *not conclusive* it is no judgment. Necessarily, then, a judgment is the final determination of an action or the end of the trial, and is binding and conclusive on the parties until annulled. Nor can it be avoided, annulled, or reversed, except by the commencement of a new proceeding, requiring the service of papers to give jurisdiction to another and separate tribunal invested with appellate powers, not for the purpose of retrying the case, but for the purpose of ascertaining if the court which tried the case committed error. And if error be found, it does not retain the case for trial, but reverses the judgment and remands the cause for a new trial, except in suits in equity, and then to examine the evidence for the purpose of ascertaining if the findings and the conclusions of law drawn therefrom be correct. It does not undertake to try the case further than to re-examine it in the exercise of the revisory power vested by the Constitution in this court. It says in effect to the trial court, you erred or did not err, as the case may be, in the trial of this cause, and your judgment must be reversed or affirmed, as the case may be. This shows, as we think, that the proceeding here is distinct—a step in the progress to final determination—but a new proceeding to ascertain if during the progress of the trial, or in the proceedings from the beginning to the final termination thereof in the judgment, an error was committed by the court.

It examines the record to find out if the judgment or final determination of the cause be correct, and in no other sense does it render judgments. It reverses, affirms, or modifies them. If, then, a judgment is the final determination of a cause, the process to correct supposed errors therein must be in the nature

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of a new action, and the statute invoked in relation to substitution can have no application to it. It is nothing more than the common-law rule, which did not require that the party suing out the writ of error, or as we say, bringing the appeal, to continue his attorneys of record; but may employ whom he pleases, and is a matter of his own concern, and in which the courts nor the opposing party did not have any interest. But it is said that an action or suit is to be deemed pending by section 514 of the Code until finally determined on appeal, or until the time for appealing shall have expired, and that this construction is inconsistent with it, or as counsel claim, shows that it is a continuation of the trial until finally determined on appeal, or until the time for appeal had passed. If this be true, it cannot be conclusive to bind the parties until reversed, and must overrule. (*Day v. Holland*, 15 Or. 464.) What, then, does that section mean? Simply this: That an action shall be deemed pending until finally determined on appeal, or until the time for appealing should have expired for all incidental or ancillary purposes, as it did at common law, namely: To sue out execution to entire satisfaction of the judgment, serve notice on the attorneys as they appear of record, etc. For all of these purposes, and possibly some others, the action will be deemed pending. In *Holland v. Day*, we held that this section did not declare a new rule of law, but that was simply declaratory of the rule as it existed at common law, to which we must look for its construction.

In many instances the Code formulates substantive principles of the common law, of which those sections relating to evidence and procedure may be cited as examples. This being so, there is no rule or law requiring the appellant to retain his attorneys of record, to serve papers or to argue his case in this court. All any party is bound to do is to look at the record, if he wants to serve a paper, to serve it on the attorney of record. If the attorney's relations to the cause has ceased, he must send the papers to his client, for they will bind him, and he cannot, as in 6 How. Pr., come into court and try to show no service because he was no longer attorney for the party. The court will not allow that. But here the reason of the rule ceases. It only has

Points decided.

relation to the person *on whom* service is made, and not to the person *giving the notice*. What possible difference can it make to the respondents so they get the notice.

The object of the rule was to direct parties to the record, and whoever appeared there as the attorney of the party may properly be served with notice. In *Day v. Holland, supra*, the ground of JUDGE LORD's dissent was the construction given a like section of the California Code by the Supreme Court of that State, although his opinion indicates that he regarded the section as a statutory declaration of the principle as it existed at the common law, and in the absence of the decisions to which he referred, he would have applied that construction to it which would have been in conformity to what is here said.

We think he gave too much importance to those decisions, especially where they are not harmonious, and that if he had followed his own construction of what he conceived to be the true meaning of the section, he would have reached this conclusion in that case. As we think that case is good law we shall overrule the application to rehear the motion.

[Filed January 23, 1888.]

STATE OF OREGON, RESPONDENT, v. B. HUFFMAN,
APPELLANT.

LARCENY—EVIDENCE.—Appellant was placed on trial for the larceny of a steer.

The evidence showed that his employer ordered him to go and get a certain steer belonging to him, then on the range, and take it to O., to whom he had sold it; that he found the steer in question where he had been directed to get the one belonging to his employer; that he drove it to O.'s slaughter pen and left it there. O. testified that he butchered the steer, and after spreading the hide on the ground he saw the letters "S. G." branded on the hips; that he left the hide in that condition, with the head of the animal near it, when he left the place on the evening the animal was killed. On being asked what condition he found things in the next morning, he answered, over proper objections from the defendant's counsel, that "the brand was cut out from the hide, and the head was about one hundred yards from where he left it." *Held*, there being no evidence tending to connect defendant with these acts, it was incompetent to show the mutilation of the hide after the animal was delivered to O.

16	15
16	206
16*	640
18*	23

16	15
48	190

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SAME—INSTRUCTION—BURDEN OF PROOF.—The defendant claimed that he took the animal—for the larceny of which he stood indicted—by order of his employer, and that he believed it to be the property of his employer. The court instructed the jury that the defendant “must establish that he took the steer under claim of right, color of title, or by mistake.” *Held*, error, because it placed the burden of proof on the defendant.

WITNESS—EXAMINATION OF—JUROR.—On a former trial of this cause, S., a co-defendant, was acquitted, the jury disagreeing as to the appellant herein. S. was a witness in said former trial, and pending the re-trial of the appellant, S. died. H. was a juror on the first trial, and in the second trial was called to prove the statements sworn to by S. in the first trial. On cross-examination the court allowed the district attorney to ask the witness, under proper objections, if he did not hang the first jury for thirty-six hours, and other questions touching his conduct as a juror in said cause. *Held*, error.

INSTRUCTIONS.—The court has no right to direct as to the credence the jury shall give to any evidence submitted to them.

APPEAL from Umatilla County. Reversed.

Tustin & Leasure, for Appellant.

M. D. Clifford, District Attorney, and *Ramsey & Bingham*, for the State.

THAYER, J.—This appeal comes here from a judgment of conviction of the appellant for the larceny of a steer, the property of Samuel George, obtained in the Circuit Court for the county of Umatilla. He was indicted in said court by the grand jury of Umatilla County for said crime jointly with one O. H. Stanley. A trial was had upon the said indictment, which resulted in the acquittal of Stanley, and a disagreement of the jury as to the guilt of appellant. At a subsequent term of the said court the appellant was again put upon his trial, was found guilty, and the judgment of conviction entered thereon, from which this appeal is taken. The appellant assigned several grounds of error in his notice of appeal, which have been considered by the court and will be referred to herein.

The first ground of error is the admission of the testimony of Edward Olcott as to his finding the brand cut out of the hide of the animal after it had been butchered. The evidence showed that the appellant was working for O. H. Stanley, who was his father-in-law; that Stanley was the owner of quite a number of cattle upon the range, including a white steer very similar to the

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one alleged to have been stolen; that he made arrangements with appellant to go and get his steer, then running with his milch cows, at what was known as Smith's place in Jack's Cañon, and deliver it to said Olcott, to whom he had sold it; that in pursuance thereof, appellant went and got the steer in question, under, as he claimed, a mistake, which claim the evidence seems strongly to corroborate; that he found the steer at or near the place from which he was directed to get him; took him along the public highway in the daytime to Olcott's slaughter pen and left him there, and went to town, where he found Olcott and informed him of the fact; that Olcott paid him part of the money for the steer, which he paid over to Stanley; that when appellant informed Olcott that he had left the steer at the pen, the latter went down to the pen to see the animal and locked the gate of the pen; that there was no other animal in the pen. The next day he saw the animal again in the pen, and on the evening of the third day after the animal was put in the pen, he killed and skinned it. After butchering the animal he noticed the head and saw that there was a split in the right ear. He then spread the hide out on the ground and could see the letters "S. G." branded on the right hip. He left the hide spread out on the ground with the head near it, and went back to his shop. That he went to the pen again the next morning. The witness was thereupon asked by the district attorney in what condition he found things the next morning. The appellant's counsel objected to this evidence. The court overruled the objection, and an exception was taken to the ruling. The witness, in answer to the question, stated "that the beef was hanging up in the shop where he left it the evening before, but the head he did not see, and the hide was thrown together 'like' from where he left it. That he spread it out and saw the brand was cut out of it; that he hauled the beef up to the market and went back afterwards and found the head down near the stream about a hundred yards from where he left it; that there was a piece of the hide cut out about a foot square. Would judge the animal worth \$26.60, the amount he paid for it." No testimony appears to have been given implicating the appellant with the cutting of the hide as

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mentioned, nor any circumstance proved indicating that he did it. Whether he did do it or not seems to have been left wholly to inference and conjecture. This presents the first ground of error relied upon by the appellant's counsel.

The next alleged error consisted in the court permitting the district attorney to interrogate one George W. Hanna, concerning the following matters upon which he was examined. Hanna was a juror upon the former trial, in which Stanley was acquitted and the disagreement as to appellant was had. Upon that trial Stanley testified as a witness and had since died, and Hanna having been on that jury and heard Stanley's testimony was called by the appellants as a witness to prove what the deceased testified to on said occasion.

After the examination of the witness in chief was concluded, which was confined to the proof of Stanley's testimony, the district attorney asked him a number of questions regarding the deliberations of the former jury, among which were the following: How many men were on that jury? Did the other eleven remember the testimony as you did? Did they agree with you? Is it not a fact that you hung that jury thirty-six hours? How long did you hang it? referring to the jury. How long were you out on that jury? How long did you hold that jury against the eleven? As a matter of fact, did you not go into the sheriff's office and get your overcoat and shoes and go back there determined to stay? Here the court said to the witness, "You may state all that you did and what your recollection is in regard to it," and then said to the district attorney: "Ask him any questions you please to test his memory concerning that case."

The examination proceeded in this manner to a considerable length, the attorney for the appellant protesting all the time against it, and after the testimony upon that point was concluded moved the court to strike it out, which was refused, and an exception taken to the ruling. The other grounds of error relate to certain instructions given by the court to the jury, and to the refusal to give instructions asked by the appellant's counsel.

The following are the instructions given, and those refused referred to: "The mere assertion of this defendant Huffman, or

O. H. Stanley, who was indicted with this defendant Huffman, or the assertions of said Stanley and Brady Huffman made at or near the time of the taking, or since then, that they, or either of them, were the owners of the property named in the indictment, or that the taking of the steer named in the indictment was through mistake, is not sufficient to establish such fact. There must be, or ought to be, some other evidence or circumstance corroborative to establish that fact." "It is not necessary that the evidence establish that the animal named in the indictment was taken under claim of right or color of title, or by mistake beyond reasonable doubt; but it is sufficient if either one of such conditions be shown by a preponderance of the testimony, or by the weight of the testimony, *and this must be shown by the defendant.*"

The appellant's counsel requested the court to give the following instructions: "The fact that the brand upon the hide was mutilated, and the head and ears removed after the animal was slaughtered by Olcott, is no evidence connecting this defendant with the crime charged, unless there is evidence connecting the defendant with such mutilation of the hide or the removal of the head and ears." Which instruction the court refused to give to the jury, but in lieu and instead thereof, gave the following instruction: "The fact that the brand upon the hide was mutilated, and the head and ears removed after the animal was slaughtered by Olcott, is a fact and circumstance that you may consider. It is for you to say from all the facts and circumstances whether the defendant or Stanley have been connected with or had any connection with the mutilation of the head or hide."

During his instructions the court instructed the jury as follows: "If the jury believe from the evidence that the taking, if any, by the defendant was an open taking, and that in taking the same was over and along a public road or in sight of other persons, this is a circumstance that you may consider in determining what the intention of the taker was, or whether there was any larceny intended. But the mere fact that the property was taken openly or in daylight is not conclusive, for it may be that the fact of openly taking certain kinds of property may be used

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simply as a cloak or trick, or it may be the result of recklessness embolden by like successes, or it may be that the very cloak that the law throws around innocent people has been prostituted by the person committing the larceny."

The question arising upon the first alleged error is, whether it was competent to show the mutilation of the hide after the animal was delivered to Olcott and butchered, without some proof being made or circumstances shown tending to implicate the appellant with the act. The taking of the animal under the circumstances disclosed by the evidence was not sufficient of itself to constitute larceny. It was necessary to establish the *animo furandi* or the law will adjudge the kind of taking referred to only a trespass. (*Littlejohn v. State*, 57 Miss. 273; *Stuart v. People*, 73 Ill. 20.) Even where a person knowingly takes and appropriates the property of another, it is not necessarily a larceny; the character of the taking may be such as to rebut any felonious intent. (*McDaniels v. State*, 33 Tex. 419.)

If it had been found that the appellant did the mutilation of the hide and removed the head, it would have been a contingent circumstance in the proof to establish a felonious intent. It would have been evidence from which the jury would have been authorized to infer that he took the animal for the purpose of stealing it. It would then, however, have only been an inference, which, as defined by the Code, is a deduction that the reason of the jury makes from the facts proved without an express direction of law to that effect. (Code, 1874, § 761.) It would appear as if the court entertained the view that the jury had the right to infer that the appellant destroyed the brand, from the fact that he took and delivered the animal to Olcott, and then I suppose infer from that, that he was guilty of the crime charged. If that were correct, there would be no limit to the extent to which deductions could be drawn from, a circumstance, however, indifferent in itself. If the appellant turned the steer over to Olcott and relinquished control over the animal entirely, and the latter had absolute and complete possession of it when the act was committed, it could hardly be inferred from the fact of his taking and delivering the steer to Olcott, originally, under the

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circumstances shown by the proof, that he did the mutilation. If the appellant was guilty of larceny of the steer, then he is the one most probably who abstracted the brand. Having stolen the animal it might reasonably be inferred that he cut the brand out of the hide in order to conceal the evidence of his guilt. And I do not see how the inference can be made without *presuming* him guilty of the theft charged. The fact of his having taken the steer to Olcott, from which the inference was allowed to be drawn, was too remote. The law is too tender of human liberty to admit of such proof. A party charged with a felony must be proved guilty, either by direct evidence or by a complete chain of circumstances inconsistent with any other reasonable hypothesis. Inferences must be deduced from facts established by clear and positive proof, and the latter must be of such a character as to justify the former.

In the opinion of this court, the inference that the appellant cut the brand out of the hide, and removed the steer's head, was not properly deducible from the general fact, that he took and delivered the steer to Olcott in the manner shown by the evidence. Nor was the proof of the hide having been mutilated, and the animal's head removed, apparently for the purpose of concealing it, competent, unless the State adduced evidence tending directly to implicate the appellant with the act. The exception to the proof, upon that ground, was therefore well taken. The exception to the pretended cross-examination of the witness Hanna was also well taken. The district attorney had no right to inquire of said witness whether he did not hang the jury for thirty-six hours, nor how long he hung the jury, nor anything relating to the deliberations of the jury. The evidence was no more competent upon the pretended cross-examination, than it would have been if the witness had been called on behalf of the State, and the inquiries made directly.

The memory of a witness may be tested upon cross-examination, in reference to matters he has testified to in chief, and his interest and state of feelings toward the adverse party be inquired into; but no such latitude as that allowed in this case should have been permitted. It disclosed how the former jury

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stood in regard to the guilt of the appellant, and was calculated to influence the jury who were then trying the question; and the claim that it was pursued in order to test the witness' recollection, and to ascertain the state of his mind towards the appellant, was *far-fetched*; it appears too much like a pretense. The witness was a proper person to be called to prove what Stanley testified to upon the former trial, and his having been called as a witness for that purpose did not give the district attorney any right to question his acts as a juror upon the former trial.

If his testimony was incorrect, the other eleven jurors and the judge who presided at that trial could have been called to show its incorrectness, and he could have been questioned as to his interest, or as to the state of his feelings toward the appellant without going into the matters mentioned. That the witness when on the former jury stood out against the other eleven, and was in favor of an acquittal of the appellant, proved nothing to his discredit. He was sworn to try the case according to the law and evidence, and if he was not able to view the matter as the balance of the jury did, it was his *duty* to disagree. He was not compelled to believe the accused guilty because the other jurors did. He was entitled to follow his own convictions as to that matter. What inference had the jury a right to draw from the fact that the witness did hang the jury, as it is termed, on the previous trial? Can it be claimed that it tended to prove that he was prejudiced or biased to an extent that would influence his testimony? If it could properly be so claimed, then the proof could be made a legitimate basis for such deduction. But I hardly think any attorney who considers the question will so conclude.

The performance of jury services is not a pleasant duty at best, and if persons who are required to discharge it are liable to be questioned afterwards as to how they voted in the jury-room, for the purpose of reaching a conclusion, in order to lay a foundation to impeach their testimony as witnesses, and lawyers allowed to animadvert upon their motives, the burden will be rendered more distasteful still, especially to those who are sensitive and conscientious. Matters of that character ought to be privileged from inquiry for any such purpose.

The instructions excepted to are all faulty. The first one, in the order in which I have arranged them herein, that "the mere assertion of this defendant Huffman, or O. H. Stanley, who was indicted with this defendant Huffman, or the assertions of said Stanley and Brady Huffman, made at or near the time of the taking, or since then, that they, or either of them, were the owners of the property named in the indictment, or that the taking of the steer named in the indictment was through mistake, is not sufficient to establish such fact; there must, or ought to be, some other evidence or circumstance corroborative, to establish that fact," was improperly given. The matter therein charged presented the facts of the case to the jury, which the court had no right to do. (Code, 1874, § 198.) After the testimony of the "assertions" referred to in said instructions was admitted in evidence, it became the province of the jury to judge as to its effects. The court had no right then to comment upon it. If the testimony tended to prove the fact referred to, it belonged to the jury to determine whether or not it was sufficient for that purpose.

The court, when the testimony was offered, had the right to decide whether or not it tended to prove the fact, and when it decided that it was admissible upon that ground, all questions as to its effect passed beyond the court's control. Nothing remained for it to do, but to state to the jury the matters of law which it deemed necessary for their information in giving their verdict, and inform them that they were the exclusive judges of all questions of fact. The jury might, if the court had not interfered with them, have found from the "assertions" that the appellant took the steer and drove and delivered it to Olcott through mistake; and it was for the purpose of preventing such interference that the said section of the Code was adopted. That provision is mandatory in its terms and must be observed. If the court desired to state to the jury any matter of law applicable to any particular facts which might be found by the jury, it could have stated a hypothetical finding and have informed them what the law would be in regard thereto. But it is effectually barred out of the jury-box. It has no right to direct as to the

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weight the jury shall give to any evidence submitted to them, or instruct them in other respects except as provided in section 835 of the Code of 1874. The next one of said instructions, to the effect that the appellant must establish that he took the steer under claim of right, color of title, or by mistake, was all wrong. No conviction of a person charged with a crime can be had in this State, unless he is proved guilty beyond a reasonable doubt. And it matters not whether such doubt arises out of some defect or weakness in the evidence introduced upon the part of the prosecution, or is created by proof given upon the part of the accused.

The burden of proof is upon the former from the beginning to the end of the trial. It is never changed. There are some cases in which the accused has the right to interpose a special defense, and which he is required to prove in order to avail himself of the benefit of, but they relate to extrinsic matters. Proof given upon the part of the accused, tending to disprove the charges made against him, is as effectual to create a reasonable doubt, as an infirmity in the proof on the part of the prosecution. When all the evidence in the case, both *pro* and *con*, is submitted to the trial jury, the ultimate question for them to determine is, whether in view of all the facts shown the accused is proven guilty. If the evidence upon the part of the prosecution is inconclusive in some particular, either on account of its inherent weakness, or of its having been rendered so in consequence of contradictory evidence brought forward by the accused, and such a doubt as to the latter's guilt is thereby raised in the minds of the jury as would cause them to hesitate to decide grave and important affairs of their own, they should certainly render a verdict of acquittal.

The Circuit Court in this case, in giving the said instruction, completely reversed the rule we have here indicated. By the tenor of the instructions the appellant was required to prove his innocence in order to entitle himself to an acquittal. He had to establish that the animal named in the indictment was "taken under claim of right, or color of title, or by mistake." Such a character of taking would of course exonerate him from the charge of larceny, as it would disprove any felonious intent.

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The court, however, very graciously held that he need not establish the fact beyond a reasonable doubt. The language of the court was as follows: "But it is sufficient if either one of such conditions be shown by a preponderance of testimony, or by the weight of testimony; and this must be shown by the defendant. I have no doubt but that the people of Umatilla County and vicinity have been greatly harassed and annoyed by a set of cattle thieves, who have for a long time infested that section of country; and that they have become highly exasperated on account of the frequent depredations committed upon their stock. Their condition of temper, doubtless, has become such that they are inclined to exact of a person, who has interfered in any manner with another's cattle, proof that he did not intend to commit larceny. The sentiment has grown out of a determination not to be despoiled of their property. But the State cannot afford to have a rule, adopted in the interest of humanity centuries ago as a bulwark against cruelty and oppression, abrogated even to save the loss of all the white yearling steers in the country."

The next exception was to the refusal of the court to charge that the fact that the brand upon the hide was mutilated, and the head and ears removed after the animal was slaughtered by Olcott, was no evidence connecting the appellant with the crime charged, unless there was evidence connecting him with the mutilation of the hide, or removal of the head and ears.

The court, after refusing to give the instructions as requested, charged the jury that the fact that the hide was mutilated and head removed after the animal was slaughtered by Olcott was a fact and circumstance that the jury might consider, and was for them to say from all the facts and circumstances whether the appellant or Stanley had any connection with the affair. What we have already said in regard to the admissibility of the evidence as to the condition in which Olcott, when he returned to the slaughter pen, found things there, is applicable to the questions arising on this exception, and nothing further need be added.

The next and last exception is to the instruction given as to

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the manner of the taking and delivery of the steer. This instruction would have been correct if the court had stopped at the word "intended" and before the word "but." The part of the instruction between and including the words "but" and "larceny" at the end of the instruction is open to the same objection made to the first instruction excepted to. Our Code, it will be noticed, strictly limits trial courts in giving instructions to the statement of matters of law. In cases like the one under consideration, the court can properly state but little more than to define the crime and explain the meaning of a reasonable doubt. The questions involved in such cases are almost exclusively questions of fact, and if a trial judge is not exceedingly careful in charging the jury, he will go beyond the boundary the Code has established on that subject, and thereby commit error.

The judgment of conviction appealed from will be reversed, and the case remanded to the court below for a new trial.

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[Filed January 30, 1888.]

DAN MARX, APPELLANT, v. CHARLES GOODNOUGH,
RESPONDENT.

PARTNERS—SALE OF PARTNERSHIP INTEREST BY ONE—EFFECT OF.—A sale by one partner of his interest in a concern dissolves it; and the assignee or purchaser becomes a tenant in common with the other partners, and such assignee or purchaser may maintain a suit for an accounting against the other partners, and the persons to whom they have transferred their interest.

APPEAL from Union County. Reversed.

J. R. Crites, and *C. H. Finn*, for Appellant.

R. Eakin, for Respondent.

STRAHAN, J.—This is a suit in equity, commenced by plaintiff against the defendant for an accounting in relation to the business and property of the partnership of W. S. Wines & Co., which firm consisted of W. S. Wines and H. B. Glover.

16	281
23	545
16*	918
32*	511

The amended complaint is, in substance, as follows: (1) That on or about the fourteenth day of October, 1884, at Island City, Union County, State of Oregon, the above-named defendants, H. B. Glover and W. S. Wines, entered into and formed a copartnership, under the firm name and style of W. S. Wines & Co., for the purpose of carrying on and conducting, on equal terms and shares, a general saddle, harness, and hardware business; and on said last-mentioned date the said firm of W. S. Wines & Co. opened and established the said firm business at said Island City, and continued to carry on and conduct the same jointly under said firm name from said last above-mentioned date up to and including the twenty-third day of January, 1885. (2) That on the said twenty-third day of January, 1885, the said firm of W. S. Wines & Co. had a large and valuable stock of goods, wares, and merchandise, consisting of harness, saddles, bridles, blankets, leather, whips, and a general assortment of hardware on hand in said business, of the aggregate value of about three thousand five hundred dollars, besides fixtures and good-will of said business, together with the tools belonging thereto; and a large amount of valuable book accounts, as plaintiff is informed and believes, were then due and owing to said firm of W. S. Wines & Co. The aggregate value of said fixtures, tools, and good-will of said business, and the amount of said book accounts, was and is, at this time, unknown to this plaintiff. (3) That on the twenty-sixth day of January, 1885, the said plaintiff herein purchased of and from said defendant H. B. Glover, all his right, interest, claim, title, and demand in and to said copartnership business (the same being an undivided one-half interest of, in, and to the same), then being carried on and conducted as aforesaid by the said firm of W. S. Wines & Co., at said Island City, together with all of said H. B. Glover's interest and demand in and to the book accounts due and owing to said firm, as well as every other article of personal property or thing belonging to or conducted with the business thereof. (4) That on said last-mentioned day, June 26, 1885, at said Island City, the place where said copartnership business as aforesaid was then being carried on and conducted, the said

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plaintiff notified the said defendant W. S. Wines (partner of said defendant H. B. Glover, and member of the firm of W. S. Wines & Co., and who was at said date in the full charge, control, and possession of said copartnership business for said defendant Glover and himself) that the said plaintiff had purchased of and from the said H. B. Glover, all of his right, title, interest, claim, and demand in and to said copartnership business, and the property and book accounts thereof, and then and there demanded of said W. S. Wines to be let into the joint possession, management, and control thereof with him the said W. S. Wines. (5) That said W. S. Wines refused to receive, or permit the said plaintiff to enter into or take joint possession of said copartnership business, and the property thereof, with him, the said W. S. Wines, or to allow plaintiff to exercise any control or management over the same, or at all, and did then and there prevent said plaintiff from entering into or in any manner exercising control thereof jointly with said Wines, or at all, well knowing at said time that said plaintiff had become the joint owner thereof with him, the said Wines, and that as such the said plaintiff was entitled to enter into the immediate possession of said copartnership business, and the whole thereof, jointly with him, the said W. S. Wines. (6) That theretofore, to wit, on the twenty-seventh day of January, 1885, the said W. S. Wines sold all his right, title, claim, interest, and demand in and to said copartnership business and the property thereof to the defendants Goodnough and Church; and with full knowledge of plaintiff's equal interest with him in and to the said copartnership business, and of plaintiff's right to the immediate joint possession of the said business, and the property thereof, turned over, surrendered, and delivered unto the said defendants Goodnough and Church all of the property, books, fixtures, business, and effects of and belonging to said copartnership business hereinbefore described, and defendants Goodnough and Church took said owner's interest with full knowledge of plaintiff's interest in said partnership property. (7) That thereafter, on the said twenty-seventh day of January, 1885, said plaintiff immediately notified said defendants Goodnough and Church that the said

plaintiff was the owner of an undivided one-half interest of, in, and to the said copartnership business, and the property belonging thereto purchased by the said Goodnough and Church from said W. S. Wines, and said plaintiff then and there demanded of said defendants to be put into the joint and equal possession with them of said copartnership business and the property thereof, and in the management and disposition of the same, and the whole thereof, or that the same be segregated and equally divided between said plaintiff and said defendants Goodnough and Church, and that said plaintiff be permitted to receive or enter into the immediate possession of his interest of, in, and to said business and the property thereof. (8) That said defendants Goodnough and Church refused to comply with said plaintiff's demands, and then and there denied plaintiff the right to enter into the joint possession with them of said business, or in the management, control, or disposition of the same, or any part thereof; and then and there prevented said plaintiff, and ever since have continued to prevent said plaintiff, from entering into the possession, management, or control thereof, or any part of the same jointly with them, said defendants, or otherwise; and said defendants Church and Goodnough refused, and ever since have refused, to allow or permit said plaintiff to look at or examine the books of accounts of said copartnership, or to learn in any manner the financial condition of the said firm of W. S. Wines & Co., or to take or participate in taking an account and inventory of the stock in trade, tools, and fixtures then on hand and belonging to said copartnership business, formerly carried on and conducted by said firm of W. S. Wines & Co.; and said defendants then and there wholly excluded said plaintiff from the possession, management, and control of (jointly with them or otherwise) the said business, and the property and accounts thereof. (9) That plaintiff's interest of, in, and to the business and property of said firm of W. S. Wines & Co. was at said last-mentioned date, to wit, January 27, 1885, of great value, to wit, of the sum of two thousand dollars, and that by the refusal and acts of said defendants, hereinbefore specifically set forth, the said plaintiff has been continuously from said last

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above-mentioned date up to the commencement of this suit kept out of the possession of the whole of said business and the property thereof, and been deprived of the use and benefits of the same, and the whole thereof, as well as the profits to be derived therefrom, to his great damage. (10) That up to said twenty-seventh day of January, 1885, the said copartnership heretofore mentioned, existing between said Glover and Wines, under the firm name of W. S. Wines & Co., had not been, nor has it since said last-mentioned date been dissolved, and an accounting had by or between said copartnership, or by and between any of the parties who have succeeded to the respective interests of said firm of W. S. Wines & Co. in and to the said copartnership business, and the property thereof. (11) That an accounting between the members of said copartnership and of the parties thereto is necessary, that plaintiff's as well as defendants' rights and interests therein may be fully ascertained and determined in this court.

PRAYER OF COMPLAINT.

That the firm of W. S. Wines & Co. be dissolved, and an account be taken of all the said copartnership dealings and transactions from the commencement thereof up to the 27th of January, 1885; that plaintiff be decreed to be the owner of, and entitled to the joint possession of, with said defendants Church and Goodnough, on the 27th of January, 1885, an undivided one-half interest of, in, and to the whole of said business and property belonging thereto, and to ascertain the value of said interest to be two thousand dollars; that plaintiff have judgment against said Goodnough and Church, and each of them, for the value of his said interest in said copartnership business and the property thereof on the said twenty-seventh day of January, 1885, after the same shall have been fully ascertained and determined by the court in this suit, together with legal interest on the full amount, etc., and for general relief.

To this complaint the respondent demurred on the following grounds: "*First.* The court has no jurisdiction of the subject of the action as to them. *Second.* That the complaint does not state facts sufficient to constitute a cause of suit as to them.

Third. That several causes of suit have been improperly united." The court sustained the demurrer and dismissed the suit, from which decree this appeal is taken.

The only questions, therefore, which we are called on to consider are those presented by the demurrer. (1) Two questions seem to present themselves: *First*, What rights or interest did the plaintiff acquire in the partnership business and property of W. S. Wines & Co. by the purchase of the interest of H. B. Glover therein? and *second*, what remedies has he for the assertion and maintenance of those rights? These two questions are so intimately blended that it will be more convenient to consider them together. There can be no doubt but what a member of a copartnership may lawfully sell and transfer his entire interest in the property and business of the firm. He may clothe his vendee with all of his rights, except he cannot make him a member of the firm; the consent of the remaining members would be necessary to do that. Parsons on Partnership, section 359, states the rule thus: "The purchaser would not become a partner; but he would stand in the place of the partner whose interest he bought, and acquire all of his rights which were necessary to make his interest valuable and available. That is, he would have the right to call for an account and a settlement of the partnership concern, and to take his share of any surplus in severalty; and a court of equity would probably render him the same assistance in obtaining and enforcing these rights that they would to the partner whose interest he has bought." So it is said by another eminent American author (Story on Partnership, §§ 307-310) that if one partner make a voluntary assignment of all his interest in the partnership property and effects, that will at once dissolve the partnership and convert the assignee or purchaser into a tenant in common with the other partners. And the same result follows in case of the sale upon execution of the interest of one partner in the partnership property.

2. Under the facts stated in the complaint, the plaintiff was tenant in common in the property and effects of the late firm of W. S. Wines & Co. with the other defendants Goodnough and

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Church. The assignment in either case was subject to an accounting of the affairs of the late firm, and either one of such tenants in common had a right to insist upon such accounting, and for that purpose it was necessary to invoke the jurisdiction of a court of equity. (*Dyckman v. Valiente*, 42 N. Y. 549; 1 Story's Eq. Juris. 466; *Early v. Friend*, 16 Gratt. 21; 78 Am. Dec. 649; *Leach v. Beattie*, 33 Vt. 195; *Wright v. Wright*, 59 How. Pr. 176; *Hodges v. Pingree*, 10 Gray, 15; *Goodenow v. Ewer*, 16 Cal. 461; *Darden v. Cowper*, 7 Jones, 210.)

3. It was urged upon the argument with much confidence by the learned counsel for respondent that the plaintiff had an adequate remedy at law in this case, and for that reason a court of equity ought not to entertain jurisdiction; but we cannot accede to this view. There are doubtless cases where, as between tenants in common of chattels, as when one of the tenants wrongfully sells the chattel held in common, a court of law may grant adequate relief in damages; but it is not perceived how it would be adequate in this case, where the extent of the interest of the parties may depend on an account; nor are courts of equity without jurisdiction in every case, where courts of law entertain it. There is a large class of cases where courts of law and equity exercise concurrent jurisdiction; and matters of account being a subject of very ancient equity jurisdiction, equity would not lose it though courts of law should assume jurisdiction in like cases. But in this case it is clear that a court of law could not have any jurisdiction to grant the relief to which the plaintiff by his complaint shows himself to be entitled.

The decree will therefore be reversed, and the cause remanded to the court below, with directions to overrule the demurrer and for further proceedings.

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[Filed January 30, 1888.]

W. S. POWELL, RESPONDENT, v. DAYTON, SHERIDAN
& GRAND RONDE R. R. CO. APPELLANT.

16	33
25	126
16*	863
35*	175

LANDLORD AND TENANT—LEASE WITH PRIVILEGE OF PURCHASE—WASTE.—A tenant in possession, under a lease containing a clause conferring upon him the privilege of purchasing the demised premises, having failed to exercise his said privilege within the time allowed, is liable for waste committed on the premises during his possession.

SAME—STATUTE OF LIMITATIONS.—Under a lease containing a clause for the purchase of the demised premises within a specified time, the Statute of Limitations does not commence to run against an action for waste until the privilege is extinguished by lapse of time.

SAME—REMEDIES—ELECTION OF.—In such action for waste committed by such tenant, it is no bar to plead that the landlord had brought an action for the purchase price stipulated in the lease, which action was dismissed because the plaintiff therein failed to show a compliance with the contract on his part, by a tender of the deed at the proper time, the remedies not being concurrent.

RECEIVERS—CORPORATIONS.—In an action of the above and foregoing character, it is no defense to the same to show that at the time of the grievances complained of, the defendant (railroad company) was in the hands of a receiver.

APPEAL from Yamhill County. Affirmed.

Whalley, Bronough, & Northup, for Appellant.

James K. Kelly, for Respondent.

LORD, C. J.—This is an action to recover damages for waste. The defendant went into possession of the described premises under the following instrument:—

“That said Powell hath and doth hereby let and lease to the said railroad company his warehouse property, together with all the rights, privileges, and appurtenances thereunto belonging, situated in the town of Dayton, Yamhill County, Oregon, and more particularly described as follows: Lots Nos. five (5) and six (6), and lots Nos. thirty (30), thirty-one (31), thirty-two (32), and thirty-three (33), in the ——— of said town of Dayton, as laid out and recorded by Joel Palmer and Andrew Smith, to have and to hold the same for the sole use and benefit of said railroad company for the term of five years, commencing with July 1, 1878, on the following terms, to wit: The said railroad company shall and doth hereby contract and agree to pay the

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said W. S. Powell for the rent and use of said lots, warehouse, and the streets between said lots, together with the frontage of said lots on the Yamhill River (all of which is hereby included in this contract), the sum of fifty-five dollars (\$55) per month in United States gold coin, and shall further, and doth hereby contract and agree to purchase of said Powell, and pay the said Powell, on or before the expiration of the said term of five years, the sum of five thousand five hundred dollars in United States gold coin, for all the said described warehouse property, lots, right to said street, river frontage, etc., owned by said Powell, as aforesaid; and on the said payment by the said company, its associates, successors, or assigns, to the said Powell, his executors, assigns, or legal representatives, the said sum of fifty-five hundred dollars, the said Powell contracts and agrees to make and deliver to said company, or its legal representatives herein, a good and sufficient deed, in fee-simple, for said property. And for the faithful performance of this contract, the parties here bind their successors, heirs, assigns, and legal representatives.

"In witness whereof we have hereunto set our seals and the signatures of said Powell and the officers of said company.

"W. S. POWELL. [SEAL.]

"The Dayton, Sheridan, and Grand Ronde Railroad,

"By ELLIS G. HUGHES, President. [SEAL.]

"The Dayton, Sheridan, and Grand Ronde Railroad.

"By F. E. BEACH, Secretary." [SEAL.]

The complaint is based on an alleged failure of the defendant to make tenantable repairs, and for voluntary and permissive waste. The defendant denied this, and set up five separate and further defenses, in substance as follows: (1) That it was dissolved and ceased to exist as a corporation on the 2d of June, 1879, and hence could not be sued at the time this action was brought; (2) that the acts of negligence alleged were barred by the Statute of Limitations; (3) that the said acts of negligence occurred while the property was in the possession of a receiver of the United States court, and hence, that the defendant was

not responsible therefor; (4) that all the damage alleged was the result of inevitable accident; (5) that the whole matter was barred by the former action, or by an election of remedies. Upon issue being joined, a trial was had which resulted in a verdict and judgment for the plaintiff. At the outset, it may be observed that the instrument referred to contained two distinct and several agreements, namely, a lease of and a contract for the sale of the described premises.

For present purposes, it is sufficient to say, by its terms, the defendant could put an end to the lease under which he took possession at any time during the term, or at its expiration, by exercising its right to purchase the demised premises, and hence, whether the relation of landlord and tenant should continue during such term, when the alleged waste occurred, depended upon the option or choice of the defendant. In all leases there are implied covenants unless expressly excluded. These implied covenants form as much a part and parcel of the contract, as if actually written or incorporated therein. When the effect of a contract is to invest a party with a legal right, such right exists as much for his benefit and protection as if expressly stipulated. The law implies an obligation on the part of the tenant to use the premises leased in a proper and tenantable manner, and not to expose the buildings to ruin or waste by acts of omission or commission. "But in every lease there is," said Mr. Chief Justice Waite, "unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to use the property as not unnecessarily to injure it," or, as it is stated by Mr. Comyn, "to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee." (Com. Land. & Ten. 188.) This implied obligation is a part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. (*Holford v. Dunnett*, 7 Mees. & W. 352.) It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible.

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(*Horsefall v. Mather*, 7 Holt, 9; *Brown v. Crump*, 1 Marsh. J. J. 569; *United States v. Bostwick*, 94 U. S. 66.) Nor is there any dispute so far as relates to the contract of lease that it contained any express covenant inconsistent with, or intended to exclude the operation of such implied covenant. But it is said that the right to purchase the premises with which the defendant is invested at any time during the term under the contract of sale is contradictory of, and inconsistent with such implied covenant or obligation, and hence, it must be considered as excluded, or as expressly covenanted against.

In this view it would result that the plaintiff has no cause of action. But is this the effect of that contract? It is indisputably true that the two contracts cannot be in force and operation at the same time.

While the contract of sale remains dormant or unexerted, necessarily, the lease is in full operation and effect, with all the incidents and implied obligations which result from the relation of landlord and tenant. The intent is that the lease shall remain intact while the contract of sale remains unexecuted. The exercise of the right to purchase during the term extinguishes the lease, and thus terminates the relation of landlord and tenant, and creates at once the relation of vendor and vendee. The effect is not simply to nullify the implied covenant to use the property in a tenant-like manner, leaving the lease in all other respects in full force and operation, but to blot out of existence the lease, with all its incidents, express or implied. Until put in force the contract of sale was not antagonistic to the lease; for the instant vitality was infused into it, there was no lease, and the relation of landlord and tenant was thereby determined.

The two contracts could not be operative and co-exist, and hence, the contract of sale could not have the effect to modify or otherwise affect any provision of the lease, express or implied, while it was in force. While, therefore, the defendant refrained from exercising the right to purchase, and thus allowed the relation of landlord and tenant to continue, it was impliedly bound to treat the demised premises in such manner that no

substantial injury should happen, and to make the tenantable repairs. In such case the rule is that an action may be maintained on such implied covenants in like manner as if the instrument had contained express covenants to perform them. (*Frey v. Johnson*, 22 How. Pr. 316.)

It is next urged that the action is barred by the Statute of Limitations. The evidence shows that the injuries complained of occurred more than six years before the commencement of this action. Upon this state of facts, the counsel for the defendant asked, and the court refused to give the following instruction, which is alleged as error: "The plaintiff cannot recover damages in this action for any injury that occurred to the property mentioned in the complaint, if such injury occurred more than six years before the commencement of this action. If, therefore, you find that the warehouse, which is alleged to have been carried away by the water, was so carried away more than six years before the commencement of this action, the plaintiff cannot recover for any damages that may have resulted to him by the washing away of said warehouse." The contention of counsel for the defendant upon this point may be thus summarized: (1) That the relation of landlord and tenant existed between the parties at the time the alleged injury occurred, or was committed; (2) that the reversion was in the plaintiff during the whole term; and, therefore, (3) that for any damage done to the reversion, an action would lie from the moment the negligent or wrongful act was committed. The cases cited in support of this view, and principally relied upon to sustain it, are, *Provost etc. v. Hallett*, 4 East, 489; *Agate v. Lawenbein*, 57 N. Y. 604. When there is no other contract between the parties in reference to the subject-matter *except the lease*, as in the cases cited, the correctness of the argument need not be disputed. The question then is, whether the tenant, at the time the wrongful act was done, caused an injury that then affected the plaintiff as to his reversion. When, however, there is lying alongside of the lease in the same instrument a contract to purchase the subject-matter demised, which at any time during the term, and at the will of the tenant alone, may be put in force,

and thereby terminate the lease and absorb the reversion, the question then is, whether any right of action for such injuries can be prosecuted while such right to extinguish the lease and own the inheritance remains. In a word, was not the effect of the contract of sale to postpone any remedy under the lease until the time expired in which the contract of sale was to be executed? Now the action brought by the plaintiff is based on waste, which is defined to be “a spoil or destruction in houses, lands, or tenements to the damage of him in reversion or remainder. (Taylor’s Landlord and Tenant, § 345; *Davenport v. Magoon*, 13 Or. 6.)

A reversion is defined by Blackstone to be: “The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.” (2 Blackst. Com. 175.) Coke describes it as follows: “The returning of land to the grantor, or his heirs, after the grant is over.” It seems then to have two significations: the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended. (Abb. Law Dict.) The reason which Mr. Comyns gives why the lessee is bound to treat the premises demised in such a manner that no injury may be done to the inheritance is, “that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee. (Com. Land. & Ten. 188.) Where no other contract exists between the parties but a lease, whether the estate shall revert after the termination of the particular estate, or the residue left in the landlord shall commence in possession after the particular estate is ended, is certain and irrevocably fixed from the nature of the contract, and hence, any wrongful act done which *then* causes an injury to the reversion, a right of action immediately accrues. The injury is immediate, though the enjoyment of the reversion is postponed until the expiration of the lease; but this is not our case. Here the instrument contained two contracts—a lease and a contract of sale.

After the execution of that instrument, as the defendant did not exercise its right to purchase, it must have entered into

possession of the premises under the lease; but it had the right or option at any time within five years after making such contract—even the next day thereafter—to purchase the property and thereby terminate the lease, and release itself from the performance of all things, express or implied, stipulated in the lease.

In any event, the property could not revert to the plaintiff until the expiration of the term of five years, nor could he, under the contract of sale, terminate the lease by tendering a deed, except on the expiration of such term. Not so with the defendant. It could put an end to the lease at any time during the term it chose to exercise its right to purchase the property, and as this right when exercised would change the relation of landlord and tenant into that of vendor and vendee, it would necessarily extinguish any claim which the plaintiff would have to recover damages for waste. Whether the estate would revert to him, or whether he would have a reversionary interest, depended wholly upon the will of the defendant for the period named. So long as such right of purchase lasted, the defendant had the unrestricted legal right to put in force the contract of sale and absorb the lease and reversion, and consequently the plaintiff could have no right of action for waste which it was not in the power of the railroad company to defeat or extinguish. The fact whether the estate should finally or ever revert to the plaintiff is not fixed and certain, but dependent exclusively upon the will of the defendant during the term and while the legal right to exercise it remains. There can be no act of waste committed during such term which the defendant cannot avoid by the exercise of such right to purchase. In such case the plaintiff's right of action can only be maintained when the defendant's right to purchase is gone or lapsed. It seems to us this result is inevitable. For, if the defendant chose to buy the property after the alleged waste was committed, which it had the undoubted right to do, it would, so to speak, repair its own wrong by taking to itself the reversion, and thereby extinguish any right of action for such alleged injuries resulting to it. The effect would be to determine the relation of landlord

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and tenant, and the parties thereafter would stand in the relation of vendor and vendee under the contract of sale. (*Kerr v. Bradley*, 105 Pa. St. 191.) This shows that the right to buy which such contract gave to the railroad company might be used to defeat such action, and that while it lasted, the plaintiff's right to sue for injuries to the reversion must be postponed until the expiration of the term.

It seems somewhat anomalous, when the defendant could have terminated the lease at its option, and that the power to do so rested exclusively with it during the five years, and at the time, and after the alleged wrongful acts of waste were committed, that it should claim that the contract was inconsistent with the lease, when it failed or refused to supplant the lease by putting the contract in operation, or that the plaintiff had an immediate right of action for the injuries to the reversion, when it was in its power to take to itself such reversion, and deprive the plaintiff of his character as landlord, without which he cannot maintain this action. We do not think, therefore, there was any error in refusing to give the instruction asked, nor the instruction given by the court, to the effect that the remedy of the plaintiff was delayed until the expiration of the time mentioned in the contract, or further instruction that the plaintiff could not have maintained an action for waste during the time of the lease, because he would have been met by the contract, except as to the criticism in respect to the possession, which is not material.

The next assignment of error is to this instruction: "If, through the defendant getting into lawsuits, the property went into the hands of a receiver, this plaintiff is not responsible for that. He had nothing to do with that lawsuit; he is an outside party altogether. Although the other party might have been unfortunate, it would have to answer damages to Mr. Powell for any damages occurring. It was the defendant's business to deliver up the property at the end of five years in a good condition." It appears by the record that the alleged acts of waste, or at least the greater portion of them, occurred while the property of the railroad company was in the hands of a receiver. The counsel for the defendant contends, that aside from the

instruction being misleading in its concluding portion, that it assumes that the defendant is responsible for the acts of the receiver. It is no doubt true, as the authorities cited show, that it has often been held that a railroad company is not liable for injuries inflicted by a receiver, or his servants, while the property was in his possession as such receiver, and when it was out of the possession of the railroad company and it had no control over it. (*Ohio etc. R. R. Co. v. Davis*, 23 Ind. 560; 85 Am. Dec. 477; *Metz v. Buffalo etc. R. R. Co.* 58 N. Y. 61; 17 Am. Rep. 201; *Davis v. Duncan*, 19 Fed. Rep. 477.) In such cases the possession of the receiver is not the possession of the railroad company, but his possession is the possession of the court by whom he is appointed and controlled. Hence the acts of the receiver are not the acts of the company, nor can it control the receiver or his servants. The reason is, there is no principle of agency existing between them, or relation of master and servant, which renders the railroad company liable for the acts of the receiver or his employees. But how is this principle to be evoked to excuse the defendant for the alleged waste. There is no pretense that the plaintiff was in any way connected with causing or asking for the appointment of a receiver for the defendant, or that he has done any act which operates or has operated to work an ouster or eviction.

The only question in the present action is, whether the covenant is excused by the fact that the breach is caused by the act of a stranger. As before stated, the implied obligation of the tenant to treat the premises in such a manner that no substantial injury shall happen to them is as much a part and parcel of the contract as if incorporated in it by express language. "It results from the relation of landlord and tenant between the parties which the contract creates." (*United States v. Bostwick*, 94 U. S. 66.) Whenever a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against such liabilities by his contract. (Per Lord Ellensborough, in *Atkinson v. Ritchie*, 10 East, 530.) "And, therefore," says Mr. Platt, "if a lessee cove-

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nants to repair a house, though it be destroyed by lightning, or thrown down by enemies, yet he ought to repair it." (Platt on Covenants, § 582; *Paradine v. Jane*, Allyn, 27.) As a consequence of this doctrine of the law, in the absence of special agreement, a lessee is liable to his lessor for all waste by whomsoever committed, and may have his action over against the actual wrong-doer. (*Cook v. Champlain Trans. Co.* 1 Denio, 91; *Parrott v. Barney*, 2 Abb. Adm. 197.)

Said Beardsley, J.: "The plaintiff claims that the mill was destroyed by the wrongful acts of the defendants; and if so it was waste, for which the plaintiff being tenant for years was responsible." "It is common learning," said Heath, J., in *Attersoll v. Stephens*, 1 Taunt. 198, "that every lessee of land, whether for life or years, is liable in an action for waste to his lessor, for all waste done on the land in the lease, by whomsoever it may be committed." Chambers, J., said: "The situation of the tenant is extremely analogous to that of a common carrier to prevent collusion (and not the presumption of actual collusion); both are charged with the protection of the property intrusted to them against all but the acts of God and the king's enemies; and as the tenant in one case is charged with the actual commission of the waste done by others, so in the other case the carrier is charged with actual default and negligence, though he loses the goods by that which was irresistible, or by fraud, against which no ordinary degree of care and caution could have protected him." Lord Coke is not less explicit, for he says: "Tenants by the curtesy, tenants in dower, tenants for life, years, etc., shall answer for the waste done by a stranger, and shall take the remedy over." (4 Kent Com. 77; 3 Blackst. Com. 228; Com. Land. and Ten. 188; *Cook v. Champlain*, *supra*; *Austin v. Hudson R. R. Co.* 25 N. Y. 340.) As the defendant was bound to answer to the plaintiff for the waste, and had his remedy over against the receiver if wrong-doer, or apply to the court, who would not permit its possession to result in wrong, for the necessary protection or relief, it results that the plaintiff is entitled to recover, and there was no error in the instruction.

Points decided.

It is next claimed that the plaintiff by his former action for the purchase price waived his right to sue for damages under the lease, and by said election of remedies barred the present action. This must proceed on the assumption that the plaintiff had a right of action under the contract of sale at the time it was brought. The facts are that neither the defendant at any time during the term, or the plaintiff on its expiration, put the other in default, but permitted such contract to lapse, and consequently, as was held in *Powell v. D. S. & G. R. R. Co.* 14 Or. 356, no right of action could be based upon it, and the complaint was dismissed. If the plaintiff had infused vitality into that contract by tendering a deed, and then the defendant had refused to accept or perform under it, he would have had an action for the purchase price upon it; but then he would have had no lease, or right to bring an action for damages on it. This is not a case where the remedies are concurrent, and an election between them once being made, the right to follow the other is gone forever.

Upon the further point in respect to the dissolution of the defendant, it is sufficient to say that we are unable to reach the result claimed by counsel for the defendant, and upon the whole case think the judgment must be affirmed, and it is so ordered.

[Filed February 2, 1888.]

16	48
44	478

**JAMES WILSON, APPELLANT, v. C. L. BLAKESLEE
ET AL., RESPONDENTS.**

BONDS, JOINT—MAKERS OF—ACTION AGAINST—FAILURE OF SAME TO APPEAR—JUDGMENT.—Several parties executed a joint bond and were jointly sued on the same. One appeared and answered for all. Subsequently some of them withdrew their appearances, and the court rendered judgment against those withdrawing. *Held*, that the judgment was improperly granted and should be vacated on motion of the plaintiff.

MOTION—NOTICE OF—WITHDRAWAL OF APPEARANCE—EFFECT OF.—Where a defendant entered his appearance and afterwards withdrew the same, *held*, that section 530 of Hill's Code was applicable to his case, and that no notice upon him of the after proceedings therein was requisite.

APPEAL from Union County.

Opinion of the Court—Thayer, J.

R. Eakin, for Appellant.

T. H. Crawford, and *Ramsey & Bingham*, for Respondents.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Union. The appellant commenced an action against the respondents in said Circuit Court, and alleged in his complaint therein that in a former action in said court, wherein one W. S. Clink was plaintiff and appellant was defendant, to recover the possession of certain personal property, consisting of one hundred and thirty head of cattle and their increase for the years 1881 and 1882 and other property. The plaintiff therein claimed the immediate delivery thereof, and thereupon the respondents executed an undertaking, which recited in effect that the plaintiff had applied for the provisional delivery to him of the personal property sought to be recovered in the action from the possession of the defendant therein; and in which the said respondents as sureties acknowledged themselves bound unto said defendant in the sum of \$4,000 for the prosecution of the action for the return of the property to defendant, if return thereof was adjudged, and for the payment of any sum which the defendant might recover in the action against the plaintiff. That by means of the said undertaking, and an affidavit made by the plaintiff, and a notice to the sheriff of said county of Union as required in such cases, the said personal property was taken from the defendant in the action, this appellant, and delivered to the plaintiff therein, the said Clink. That said action was tried by the court, and that this appellant recovered judgment against the said plaintiff for the return to appellant of the said personal property, the value of which was assessed at \$2,142, and for the sum of \$318.50 damages for the wrongful detention of the property, and \$450.33 costs and disbursements in the action.

Said appellant further alleged in his complaint that said property, nor any part thereof, had been returned to him; nor had any part of the value of the property, or of the damages or costs or disbursements been paid. That by reason of the premises the respondents were jointly and severally indebted to him in the

sum of \$2,900, with interest thereon since the twenty-ninth day of May, 1884, for which he demanded judgment. An answer purporting to be the answer of the respondent Biggers only was filed, controverting a part of the allegations contained in the complaint, and setting forth affirmative matter of defense. After the filing of the answer the appellant's counsel moved the court for default and judgment against the defendants Coffin and Robbins, for want of an answer therein.

The counsel for respondent resisted the motion, claiming that the answer was on behalf of all the defendants in the action. Thereupon said Coffin and Robbins filed the following papers:—

[Title of the cause.]

“Now comes P. M. Coffin and C. E. Robbins *in personam*, and hereby disclaim any part in the answer filed in the above-entitled action, and ask the court to take their names therefrom, and hereby withdraw from further appearance in said action.

(Signed,)

“P. M. COFFIN.

“C. E. ROBBINS.”

Thereupon the court granted the motion of the respondent for default and judgment against said defendants. The judgment recites in effect that the cause coming on to be heard upon the disclaimer filed therein by defendants Coffin and Robbins, and the motion of appellant filed therein for judgment against them upon the complaint, and it appearing to the court that said defendants had, by special personal appearance, filed in writing therein, expressly disclaimed any part in the answer theretofore filed, and withdrawn from further appearance in the cause, and having failed to answer or further plead in the action, and it appearing that they were jointly and severally indebted in the sum of \$3,307.02, and thereupon said court ordered and adjudged that the appellant have and recover, etc., the usual form of judgment. The judgment also contains the further order, that the said answer be amended so as to disclose it to be the separate answer of C. L. Blakeslee and G. W. Biggers, two of the defendants in the action.

The defendants in the action, said Blakeslee and Biggers, at a

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subsequent term of the said court to which the said cause had been continued, filed a motion asking leave of the court to file a supplemental answer, which having been granted a supplemental answer was filed. It recited in substance that at the time of the commencement of the action all the defendants therein were duly and personally served with summons, and regularly appeared, etc., then referred to the circumstance of the disclaimer, and of the action of the court thereon, and thereupon, in the language of said answer, submitted that the pretended cause of action against all the defendants jointly was merged into said judgment entered against the two defendants, Coffin and Robbins, and pleaded said judgment as a complete bar to further proceedings of the action. The defendants demurred to this answer as constituting no defense. The appellant's counsel then moved to vacate the judgment entered against said Coffin and Robbins, for the reason that the entry was not authorized by law and was void. The demurrer and motion were heard by the court at the same time, and the former was overruled and the latter denied. The case at this juncture, figuratively speaking, was in convulsions, and the court evidently concluded to let it remain in that condition. At a subsequent term of the said court to which the cause in its distorted shape had been continued, the appellant's counsel renewed his motion to vacate the judgment entered as mentioned, and the counsel for the defendants Blakeslee and Biggers moved the court to dismiss the action, upon the ground, I suppose, that it was upon a joint claim, and judgment having been taken against two of the joint contractors when all of them had been made defendants in the action and been served with summons, it operated as a bar against all.

The court denied the appellant's motion to vacate the judgment, and granted the motion of the respondents' counsel to dismiss the case as to Blakeslee and Biggers, which terminated the agony attendant on the affair in the Circuit Court. The appellant brings this appeal from the judgment of dismissal, and seeks to review the orders refusing to grant the motion to vacate the judgment, and the order dismissing the action as to the said defendants Blakeslee and Biggers. The question in the outset

was simply to recover upon an alleged breach of the said undertaking. The undertaking was a joint obligation upon all the defendants in the action. They did not deny in their answer (conceding it to have been the answer of all of them) its execution, but sought to establish that they were not liable thereon by reason of discrepancy in the proceedings under which the property was taken from the appellant by the sheriff of Union County. Why the action was not tried and disposed of, without the interposition of the number of motions and demurrers, resulting ultimately in its entanglement to such an extent that its merits were not reached, would astonish a practical minded attorney, and serve to confirm the ordinary laymen in the belief that the law is a species of jugglery. It is unfortunate that legal proceedings are not conducted always with a view of justly and speedily determining the disputes and controversies between parties respecting their personal and property rights in the complicated state which their transactions often assume.

Our system of jurisprudence will not be respected or upheld unless conducted for the object and purpose of settling the disagreements between parties, honestly, promptly, and economically. This is the second time this case has been here, and it presents now only a "jangle." No question arising out of a disagreement between the parties affecting the merits of their controversy is brought here for our consideration. The appellant's counsel evidently mistook the undertaking as a joint and several obligation, and took judgment against the defaulting defendants accordingly, when it is a mere joint obligation, and he had no right to have any such judgment entered. The rule upon that subject was referred to in *Fisk v. Henarie*, 14 Or. 29, which is as follows: "In an action against several upon a joint obligation where all the defendants have been served, judgment may be had against any or either of them severally where the plaintiff would be entitled to such judgment if such defendant or defendants had been sued alone. But the rule does not authorize a recovery against a part of the defendants in such case where the others are also liable."

The judgment therefore which was entered against Blakeslee

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and Biggers was irregular. The court erred in allowing it; and if said defendants had moved to set it aside, the court would have been compelled to grant the motion. Their having withdrawn their appearance did not authorize the entry of judgment against them, until a recovery was had against the defendants who were defending against the action. Its entry, however, barred any further proceedings upon the part of appellant. His counsel seemed to realize the situation of the affair when the application was made for leave to file the supplemental answer, and he then filed the motion to have the judgment vacated. That was the only way out of the difficulty, and the court should unhesitatingly have granted the motion. The material rights of parties must not be sacrificed on account of mistakes made in the proceedings. Because the appellant's counsel made the blunder, which was occasioned evidently through the misconception of the nature of the obligation of the undertaking, his client should not be deprived of his claim against the defendants who interposed the defense. Attaching importance to technicalities of that character is a travesty on the administration of justice. The respondents' counsel claimed at the hearing that a showing should have been made upon the part of the appellant that the entry of the judgment occurred through mistake before the motion to vacate it could be granted. I do not think that point was well taken. The record shows beyond question that it was a mistake, not only upon the part of the appellant's counsel, but on the part of the court, and that the latter committed an error when it refused to allow a correction of it to be made. In view of the circumstances of the affair, an affidavit that the motion for the default and judgment was inadvertently made would not strengthen the proof of the fact. Said counsel also claimed that notice of the motion should have been given to the defendants Coffin and Robbins before the motion could properly be granted.

The Code provides that when the defendant has not appeared, notice of motion or other proceedings need not be served upon him, unless he be imprisoned for want of bail, or unless directed by the court, or judge thereof, in pursuance of this Code. (Civ.

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Code, § 520.) Coffin and Robbins had appeared in the case, but they subsequently withdrew their appearance therefrom absolutely, and it seems to me that after such withdrawal, they occupied the same position with reference to the case they would have occupied if they had never appeared at all. Again, there could have been no necessity in giving them notice. The judgment was erroneously entered against them; it was presumably prejudicial to them, and to require that they should be notified before the error committed against them could be corrected, and they relieved therefrom, would be to require the observance of a degree of fastidiousness that I utterly fail to appreciate.

The judgment appealed from should be reversed, the orders denying the motions to vacate the judgment be set aside, and the case remanded to the Circuit Court for further proceedings, in accordance with the principles of this opinion.

STRAHAN, J., dissenting.—I am unable to concur in the views of my associates in this case, and will therefore indicate briefly the grounds of my dissent. In doing so I do not propose to discuss the power which courts of general jurisdiction have over their records after the adjournment of the term. Such power, whatever may be its extent, must be derived from some statute, or else it is a common-law power which such courts have been accustomed to exercise. The power involved here is not statutory. Section 102 of Hill's Code vests in courts of record in this State power in their discretion, and upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake and advertence or excusable neglect. While I concede that in view of the objects designed to be accomplished by this statute, a party in whose *favor* a judgment is rendered, but who is in fact prejudiced by it, might be entitled to have relief under its provisions, there is no showing of any kind to bring the appellant's case within any of its provisions. I think it manifest, therefore, that he can claim nothing by virtue of this section of the Code, and that whatever power the court may rightfully exercise in this case is derived wholly

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and entirely from the common law. It is not intended to try to define the extent of such power. I know that the authorities are not uniform on the subject, and it is unnecessary to try to reconcile them.

Conceding that under proper circumstances the power sought to be invoked exists, which may be seriously questioned, two insuperable objections present themselves to my mind: (1) No notice was given to any of the parties to the action of the making of the motion; it was wholly *ex parte*; and (2) the ruling of the court thereon is sought to be questioned and reversed as against the original defendants Coffin and Robbins, neither of whom was served with the notice of appeal.

1. When the term of court ended at which the judgment against Coffin and Robbins was rendered, said court ceased to have any further jurisdiction over them. It could take no step in the action in any way affecting them without notice, or in some manner acquiring jurisdiction over them personally. Such notice is of the very essence of jurisdiction. As was said in *Littleton v. Richardson*, 34 N. H. 179: "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause. Without it there cannot be parties, and without parties there may be the form of a sentence but no judgment obligating the person." The following authorities show the necessity of notice in such cases: *Cook v. Wood*, 24 Ill. 295; *O'Conner v. Mullen*, 11 Ill. 57; *Smith v. Wilson*, 26 Ill. 186; *Swift v. Allen*, 55 Ill. 303; *Morris v. Bienvenu*, 30 La. An. 878; *Dunham v. South P. Commrs.* 87 Ill. 185; *Green v. Probate Judge*, 40 Mich. 244; *Baragwanath v. Wilson*, 4 Ill. App. 80; *Gray v. Robinson*, 90 Ind. 527; *Reynolds v. Anspach*, 14 Ill. App. 38; *Mitchell v. Lincoln*, 78 Ind. 531; *Hall v. O'Brien*, 4 Scam. 405; *Thompson v. Bishop*, 24 Tex. 302; *McKindley v. Buck*, 43 Ill. 488; *Hettrick v. Wilson*, 12 Ohio St. 136; *Ingram v. Belk*, 2 Rich. 111; *Ragh v. Ritchie*, 1 Bradw. 188; *Lill v. Stookey*, 72 Ill. 495; *McKee v. Ludwig*, 30 Ill. 28; *Lane v. Wheless*, 46 Miss. 666; *Coleman v. McAnulty*, 16 Mo. 173; 57 Am. Dec. 229; *Nuckolls v. Irwin*,

Points decided.

2 Neb. 60. I have purposely avoided entering upon any discussion of the question of the power of courts to vacate their judgments after the term at which they were entered upon *notice being given*, for the reason that I wish to place my dissent distinctly on the ground that notice was not given; but respectable authorities hold that unless the power be conferred by statute, courts have no such power. (Freeman on Judgments, § 96, and authorities cited.)

2. Equally plain to my mind is the other question. If Coffin and Robbins had appeared in the court below upon the hearing of the plaintiff's motion to set aside and vacate the judgment taken against them, the action of the court in refusing to allow the motion could not be reviewed here, it seems to me, without making them parties to this appeal by the service of the notice of appeal upon them. This was not done, and I think for that reason that no part of the case relating to or affecting them in any way is before this court on this appeal. They are as complete strangers to this record before us as though they had never been parties to it.

I have no doubt that the judgment of the court below ought to be affirmed.

[Filed February 2, 1888.]

THOMAS A. BARTON, RESPONDENT, v. D. B. SAUNDERS, APPELLANT.

HABEAS CORPUS—WHEN LIES—ARREST IN CIVIL ACTION—VOIDABLE PROCESS.—

The writ of habeas corpus will not lie to procure the discharge of a person detained by process issued in a civil action. On an affidavit which merely alleges in the statutory language that "the defendant fraudulently contracted the debt sued on," without alleging the facts which constitute the fraud, such defect in the affidavit made the process voidable only, not absolutely void.

APPEAL from Union County. Reversed.

R. Eakin, and *Cox, Smith & Teal*, for Appellant.

T. H. Crawford, and *Ramsey & Bingham*, for Respondent.

16	51
26	186
16*	921
37*	539
16	51
32	184
16	51
45	87

Opinion of the Court—Lord, C. J.

LORD, C. J.—This is an appeal brought to reverse a judgment, discharging the plaintiff from arrest, in a habeas corpus proceeding. The facts are these: The Mercantile Company commenced an action in the Circuit Court against the plaintiff to recover a certain sum of money, and in said action procured a writ of arrest to be issued, and the plaintiff taken into custody by the defendant's intestate, who was then the sheriff of Union County. Shortly thereafter the plaintiff sued out a writ of habeas corpus before the county judge of said county, upon which an order was made discharging him from arrest, and from this order the defendant appealed to the Circuit Court, where a judgment was rendered affirming the judgment of the County Court. The defendant's intestate died, and she being appointed his administratrix, was substituted in his stead, and prosecutes this appeal. The case rests mainly on the sufficiency of the affidavit for the writ of arrest, which alleged as the ground therefor, "that the defendant (plaintiff here) has been guilty of fraud in contracting the said debt, and that defendant has removed and disposed of his property with intent to defraud his creditors."

Our statute provides that no person shall be arrested in an action at law, except, among other cases, in the following instances: "(4) When the defendant has been guilty of a fraud in contracting the debt," etc.; and "(5) when the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors." (Hill's Code, § 108.) It also provides how at any time after the commencement of the action, the plaintiff may entitle himself to a writ of arrest, etc., and that the affidavit required may be either positive, or upon information and belief, etc. (§ 109, subds. 1, 2.) And finally for the protection of the defendant, it is also further provided that "a defendant arrested may at any time before judgment apply on motion to the court, or the judge thereof, *in which the action is pending*, upon notice to the plaintiff, to vacate the writ of arrest" (§ 130); and that "if the motion be made upon affidavits or other proofs on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs

in addition to those upon which the writ was issued. If upon the hearing of such motion it shall satisfactorily appear that there was not sufficient cause to allow the writ, the same shall be vacated." (§ 131.)

Upon habeas corpus, it is provided that, "if it appear on the return that the prisoner is in custody by virtue of an order or civil process of any court legally constituted, or issued by an officer in course of judicial proceedings before him, authorized by law, such prisoner shall only be discharged in the following cases: (3) When the order or process is defective in some matter of substance required by law rendering such process void. (4) When the order or process, though in proper form, has been issued in a case not allowed by law. (5) When the order or process is not authorized by any judgment or decree of any court, nor by any provision of law." (Hill's Code, § 622.)

These different provisions of our Code have been grouped for the purpose of showing some of the grounds for which an arrest is allowed, the mode to be pursued in obtaining the writ, and in case of any defect, how it may be vacated, and the prisoner discharged by a proceeding in the court in which the action is pending; and also to show some of the grounds which will authorize a court to discharge a prisoner in custody as an unlawful restraint of his liberty. The contention of counsel for the plaintiff is that the proceeding for arrest was void on its face, and, therefore, authorized the court to inquire, and to discharge him as unlawfully restrained of his liberty. This contention is based on the idea that the affidavit constitutes a part of the process, and as it did not set forth the probative facts constituting the alleged fraud, it was fatally defective on its face.

The question then is, whether the process has the sanction and authority of law; for it will be admitted, if there was no authority to arrest the defendant, he should be discharged. When the Code declares that the prisoner in a habeas corpus proceeding shall be discharged in certain cases, when in custody under civil process, we shall give the prisoner the benefit of the equity of the statute by assuming that he shall be discharged in such cases. That is to say, when it shall appear on the return

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of the writ that the order or process was defective in some matter of substance required by law rendering such process void, or that the process, though in proper form, had been issued in a case not allowed by law, or that the process is not authorized by any judgment or decree of any court, nor by any provision of law. (§ 622, subds. 3, 4, 6, *supra*.) It is an elementary principle that where a court acquires jurisdiction over the subject-matter and the person, it becomes its right and duty to determine every question which may arise in the cause without interference from any other tribunal. Upon the facts as disclosed by this record, it cannot be disputed but that the court had full and complete jurisdiction under the statute of the subject-matter of the proceeding, and of the person of the defendant, and was competent to correct any abuse of its process, or discharge the prisoner if it should satisfactorily appear there was no cause for the arrest.

The cause of action, the affidavit for a writ of arrest and the grounds thereof, the issuing of the writ, etc., were all matters not only within the jurisdiction of the court, but the process shows that it was issued in a case allowed by law and in the language of its provisions. Hence, the case does not come within any of the subdivisions of section 622 of the habeas corpus provisions, unless it be subdivision 3 of that section; that the process was defective in some matter of substance required by law, rendering such process void. "When the return shows," says Mr. Hurd, "a detainer under legal process, the only proper points for examination are the existence, validity, and present legal force of the process." (Hurd on Habeas Corpus, p. 332.) Looking at this, what is the ground or defect of substance in the process if the affidavit be a part of it, which renders it void? The counsel answers, the defect is not stating the facts in what the fraud consists; that the affidavit only states in the language of the statute that the "defendant has been guilty of a fraud in contracting the debt," etc., instead of setting forth the facts constituting the fraud, or cause of arrest; in a word, that facts are not set forth, but conclusions of law. "But," says Mr. Hurd, "a proceeding defective for irregularity and one

void for illegality may be reversed upon error or *certiorari*, but it is the latter defect only which gives authority to discharge on habeas corpus." (Hurd on Habeas Corpus, p. 327.)

Errors or irregularities which render proceedings voidable merely, the writ of habeas corpus cannot reach, but only such defects in substance as renders the process or judgment absolutely void. An *irregularity* is defined to be "the want of adherence to some prescribed rule or mode of proceeding, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner." (Tidd's Prac. 434.) "It is the technical term for every defect in practical proceedings, or the mode of conducting an action or defense, as distinguished from defects in pleadings. On the other hand, *illegality* is properly predictable of radical defects only, and signifies that which is contrary to the principles of law as distinguished from mere rules of procedure. It denotes a complete defect in the proceedings." (Tidd's Prac. 435; Hurd on Habeas Corpus, 333.) The allegation of the affidavit is in the language of the statute, declared to be a ground which authorizes the issuance of the writ of arrest. Was the substantive fact relied upon as stated a radical defect, or only, to say the most, an irregularity or error, within the meaning of the distinction taken, rendering the process only voidable? A process is not a nullity because it was issued imprudently, or in a manner not warranted by law. There must be a defect of substance, or the omission to allege something material, and without which the affidavit would be a nullity. Where the matter is itself insufficient, without reference to the manner of stating it, it goes to the substance, but where it goes to the manner of stating it, the defect is merely formal. The matter here alleged is fraud in contradicting the obligation, which by the express words of the statute is itself sufficient to authorize a writ of arrest, and the objection in not stating the facts in which the fraud consists goes only to the manner of stating it, and is not a defect of substance. This is even true as tested by the stricter rules of pleading. "If the pleading," says Mr. Pomeroy, "should aver conclusions of law

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in place of fact, as claimed here, the resulting insufficiency and imperfection would pertain to form rather than substance, and the mode of correction would be by a motion and not by a demurrer." (Pomeroy on Remedies, § 549.)

The elements of fact and law are so blended in the affidavit, taken as a whole, that no one can fail to understand the nature of the transaction and the ground of arrest, and in such case the rule is invariable that the pleading cannot be treated as a nullity, but that the party must avoid or correct it by motion. (Bliss on Code Pleading, § 213.) We do not mean to say that the facts relied upon must not be stated. No rule of pleading is better established than that facts must be stated and not legal conclusions, and that fraud when pleaded must state the facts upon which the charge is based. The point that we make is that it is no "such radical defect as renders the proceeding in which it occurs totally null and void, of no avail and effect whatever, and incapable of being made so." It is not an omission of some material matter, the fraud is alleged, and that is the substance of the ground of arrest and sufficient to authorize the writ; but the fact that such material matter is defectively stated does not render the process void, because it is an error or irregularity which may be corrected on motion in the court in which the action is pending, and not an illegality which renders the process void from the beginning. "There is a great difference," said Chief Justice De Gray, "between erroneous process and void process. The first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning." (*Parsons v. Loyd*, 3 Wils. 345.) The writ of habeas corpus was not designed to operate as a writ of error or *certiorari*, and does not have their force and effect.

It was not intended to correct errors or irregularities which only have the effect to render proceedings voidable merely, but such only as render them absolutely void. That it is the proper remedy, and may be resorted to for relief from every illegal imprisonment, no one will deny, and for this salutary purpose the doors of every court of justice invested with the power to issue the writ ought to stand wide open; but it cannot be used

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to subvert the law and usurp the power of appellate courts, or interfere and review the proceedings of other courts. Imprisonment under an order or process irregularly issued, which may be set aside, constitutes no ground for its issuance. "To put it to such use," said Sanderson, J., "would be to convert it into a writ of error, and confer upon every officer who has authority to issue the writ, appellate jurisdiction over the orders and judgment of the highest tribunals in the land. County judges, though occupying an inferior position and exercising an inferior jurisdiction, would be, by such a rule, empowered to review and practically reverse the judgments and orders of the District Courts, and of the Supreme Court itself, and also the federal courts exercising jurisdiction within the State. Establish that the judgments and orders of courts may be reviewed on habeas corpus upon the grounds of error, and appeals for the correction of errors may be dispensed with in all cases in which the arrest or imprisonment of persons is allowed. Every criminal action, every civil action in which an arrest is given, and every proceeding for contempt, could be brought to the Supreme Court by writs of habeas corpus. Not only that but as already suggested, inferior tribunals would be called upon to review the judgments of superior tribunals, and tribunals of equal grade to interfere and review each other's proceedings. Such a rule would render all judicial proceedings amorphous, and lead to the utmost confusion and disorder. It is well settled that habeas corpus can be put to no such use, and that its functions, where the party who has appealed to its aid is in custody under process, do not extend beyond the inquiry into the jurisdiction of the court by which it was issued, and the validity of its process upon its face." (*Ex parte McCulloch*, 35 Cal. 100; *People v. Cassell*, 5 Hill, 167.) That the court had jurisdiction in which the action was pending, and out of which the writ of arrest was issued, and was competent to correct any error or abuse of its process, or to set it aside if erroneously issued, is an unanswerable return to a writ of habeas corpus. This result renders it unnecessary to examine other questions.

The judgment is error, and is reversed, and writ dismissed.

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[Filed February 6, 1888.]

D. A. RICHARDS, RESPONDENT, v. J. B. CREWS,
APPELLANT.

EJECTMENT—PLEADING—COMPLAINT.—It is necessary in an action of ejectment that the complaint should allege that the plaintiff is entitled to the possession of the premises sought to be recovered.

APPEAL from Umatilla County. Affirmed.

Bailey & Ballery, for Appellant.

Ramsey & Bingham, and *Lucian Everts*, for Respondent.

LORD, C. J.—This was an action in ejectment. The objection is that the complaint does not state facts sufficient to constitute a cause of action, and the point raised on the objection is, that it is nowhere averred in the complaint that the plaintiff is “entitled to the possession” of the land described, or that the defendant wrongfully withheld the same at the time the action was brought.

Our statute declares that the complaint in actions to recover real property shall set forth that the plaintiff has an estate or interest in the premises claimed, particularly stating the nature and extent of such estate or interest, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him. (Hill’s Code, § 318.) In this class of actions, the legislature has declared what the complaint shall contain, and when the language is plain and positive as to what shall be stated, we have no other duty in the premises than to give effect to its language. Nor do we think the pleader in the complaint before us has disregarded these positive provisions of the law.

The counsel for the defendant is mistaken in this, that the plaintiff fails to allege that he is entitled to the possession of the premises described. After alleging that he is now, and has been for more than twelve years last past, the owner, etc., describing the premises, etc., the first paragraph of the complaint concludes in these words, “and that he, plaintiff, is now, and during all

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of said time has been entitled to the possession thereof." The same is true of the second paragraph, which after reciting the facts of the dispossession, etc., distinctly alleges that the "defendant has ever since said time remained in the actual possession of said land, and wrongfully withheld the possession of the same from him," etc.

We fail to see the error as claimed, and judge from the brief that there has been some oversight in the examination of the complaint.

The judgment must be affirmed.

[Filed February 6, 1888.]

THE STATE OF OREGON, RESPONDENT, v. KENNETH
McLENNEN, APPELLANT.

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41	24

CRIMINAL LAW—INDICTMENT.—An indictment which charged, . . . 'did, on, etc., at, etc., unlawfully and feloniously assault one M., with a revolver, loaded with powder and ball, by shooting him, said M., in and upon the body, and by shooting at him, the said M., all with the intent to kill him, the said M., with the said revolver, a dangerous weapon which he, said K. McL., then and there held in his hand, being then and there within shooting distance of him, said M.," will sustain a conviction for being armed with a dangerous weapon, and assaulting another with such weapon.

APPEAL from Wasco County. Affirmed.

Bennett & Wilson, for Appellant.

Ramsey & Bingham, for the State.

STRAHAN, J.—The defendant was convicted of the crime of "an assault with a dangerous weapon," upon an indictment, the charging part of which is as follows: "The said Kenneth McLennan did, on the sixth day of March, 1887, in the county of Wasco, and State of Oregon, unlawfully and feloniously assault one Thomas Moran with a revolver loaded with powder and ball, by shooting him, the said Thomas Moran, in and upon the body, and shooting at him, the said Thomas Moran, all with the intent to kill him, the said Thomas Moran, with the said

revolver, a dangerous weapon which the said Kenneth McLennen then and there held in his hand, being then and there within shooting distance of him, the said Thomas Moran, contrary to the statute," etc.

Upon the trial the jury returned the following verdict:

"We, the jury in the above-entitled action, find the defendant guilty of the crime of an assault with a dangerous weapon.

"B. W. McINTOSH, Foreman."

The defendant moved to set aside the verdict, because it was against law, but the court overruled the motion, and sentenced the defendant to imprisonment in the penitentiary of Oregon for the term of one year, from which judgment he has appealed to this court.

The only question presented or argued on this appeal was whether or not this conviction could be sustained. The indictment is drawn under section 1740 of Hill's Code, which provides "that if any person shall assault another with the intent to kill, rob, or to commit a rape upon such other, . . . such person upon conviction thereof shall be punished," etc. The jury evidently aimed to convict the defendant of the crime defined in section 1744 of Hill's Code. That section provides: "If any person being armed with a dangerous weapon shall assault another with such weapon, such person upon conviction thereof shall be punished," etc. "An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being, as raising a cane to strike him, pointing in a threatening manner a loaded gun at him, and the like." (2 Bishop on Criminal Law, § 23.) Or an assault is thus more tersely defined by Wharton: "An assault is an intentional attempt to do an injury to another." (2 Wharton's Criminal Law, § 1241.)

Under section 1740, *supra*, the offense made punishable is compounded, and consists of two elements: (1) An assault; and (2) the intent to kill. Under section 1744, *supra*, the offense is also a compound one, the elements being: (1) That the defend-

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ant was armed with a dangerous weapon; (2) that he assaulted another with such weapon.

If the intent with which the assault is alleged to have been made were stricken out of this indictment, or if it were rejected as surplusage, the indictment would still contain enough to constitute an offense under section 1744.

In such case no sufficient reason is perceived why the conviction ought not to be sustained, or that it violates any principle of law. Such, it is believed, has been the general practice in this State ever since the adoption of the Code of Criminal Procedure. Nor are authorities wanting to sustain this practice. In *State v. Robey*, 8 Nev. 312, it was held that an indictment for an assault with an intent to kill by shooting with a shot gun loaded with bullets would sustain a conviction for an assault with a deadly weapon with the intent to inflict a bodily injury. So in *State v. Collyer*, 17 Nev. 275, it was held that an indictment for "an assault with intent to kill" was sufficient to sustain a conviction for "an assault with a deadly weapon with the intent to inflict bodily injury." So, also, in *Territory v. Conrad*, 1 Dakota, 363, it was held that an indictment for an assault with intent to kill, by shooting with a pistol, would sustain a conviction for "an assault with intent to do bodily harm, and without justifiable and excusable cause." So in *State v. Delaney*, 28 La. An. 434, the defendant was indicted for "stabbing with a dangerous weapon to commit murder." The jury found him guilty of "an assault with a dangerous weapon and inflicting wounds less than mayhem," and the conviction was sustained, the court saying: "And it would seem the verdict is responsive to the indictment. In the indictment the accused is charged with assaulting and inflicting a wound with intent to murder; by the verdict he is convicted of assaulting and inflicting a wound *without* the intent charged. In the greater offense the intent is to kill; in the smaller offense the intent to kill is wanting. The offense for which he is convicted is included in the one charged in the indictment." Other authorities are to the same effect. (*Dickenson v. Commonw.* 2 Bush, 1; *State v. Bowling*, 29 Tenn. 52; *Gardenkin v. State*, 6 Tex. 347; *Clark v. State*,

Argument for Appellant.

12 Ga. 350; *Stewart v. State*, 5 Ohio, 242; *Foley v. State*, 9 Ind. 363; *State v. Stedman*, 9 Port. 495; *Reynolds v. State*, 11 Tex. 120; *McBride v. State*, 7 Ark. 374; *State v. Kennedy*, 7 Black, 233; *Commonw. v. Walsh*, 132 Mass. 8.)

We have no doubt that the verdict is responsive to the indictment, and that the offense for which the defendant was convicted is included in the indictment.

The judgment of the court will therefore be affirmed.

[Filed February 6, 1888.]

H. P. STEWART, APPELLANT, v. CHARLES HUNTER,
RESPONDENT.

ESTRAY—WHAT CONSTITUTES.—An animal turned on a range by its owner is not an estray, although its immediate whereabouts is unknown to the owner, unless it wanders from the range and becomes lost.

BRAND.—The fact that an animal is branded is not constructive notice of the ownership thereof, although the brand is recorded. The brand simply furnishes evidence of its ownership.

DUE PROCESS OF LAW—WHAT IS.—Taking up an estray pursuant to statute and causing it to be sold to pay for such taking up and for its feed is not depriving the owner of his property "without due process of law."

PRACTICE—JURY INSTRUCTION NO.—Trial courts should not instruct juries by reading to them an opinion of another court. If they desire to adopt such an opinion as the law of the case, they should copy from it and deliver the portions applicable.

APPEAL from Union County. Reversed.

R. Eakin & Bro. for Appellant.

An animal on the range where it is permitted to run at large is not an estray. (*Sheppard v. Hawley*, 4 Or. 206.)

The statute is unconstitutional. (*Ames v. Port Huron L. D. & B. Co.* 11 Mich. 139; *Cooley on Constitutional Limitations*, pp. 446, 447, and notes 1, 2; *Rockwell v. Nearring*, 35 N. Y. 307; *Campbell v. Evans*, 45 N. Y. 356; *McConnell v. Van Aerman*, 56 Barb. 535; 2 Kern, 202.)

J. R. Orites, and *C. H. Finn*, for Respondent.

Opinion of the Court—Thayer, J.

THAYER, J. — This appeal comes here from a judgment of the Circuit Court for the County of Union. The appellant commenced an action in that court against the respondent to recover the possession of a certain mare and colt alleged to be wrongfully detained by the respondent. The respondent claims to have taken up the animals under the statute of the State relating to estrays. A trial by jury was had in the Circuit Court, which resulted in a verdict for the respondent, upon which the judgment appealed from was entered.

The main question of law we are called upon to decide arises out of the instructions of the court to the jury. It was strongly contested in the Circuit Court as to whether the animals were estrays or not. It appears that the mare and colt were running upon the range in the vicinity of the respondent's residence, and seem to have gotten with his stock, which was also running upon the range at the time. The range was a large section of open country and was pastured by different owners of stock. The mare had been branded at the time she was taken up with the appellant's brand, which a long time prior thereto had been recorded in the office of the clerk of the county of Union. The appellant's counsel contended in the Circuit Court, and claims here, that the record of the brand was notice to the respondent of the ownership of the animal. He also contended that stock running upon a range under such circumstances as the animals in question ran there could not be regarded as estrays. It appears from the evidence in the case that such stock was allowed to run out all winter, and very little of it was fed. The question as to whether the animals were estrays or not was a very proper one for the jury to determine, after being instructed as to what constituted an estray under the statute referred to.

The Circuit Court in giving instructions upon that point confined itself almost entirely to reading to the jury the opinion of this court in *Sheppard v. Hawley*, 4 Or. 206. The bill of exceptions state that "after the argument of counsel, the court instructed the jury upon the law, and read to the jury as the law of the case the opinion of the court in," etc., referring to *Sheppard v.*

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Hawley. After the jury had been out a while and could not agree, they returned to the court-room for further instructions as to what constituted an "estray," and were further instructed by the court thereon, and again retired; but again failing to agree, again returned for further instructions upon what constituted an "estray," and the court again read to the jury the opinion in the case of *Sheppard v. Hawley*, and otherwise instructed them. Thereupon counsel for plaintiff asked the court to instruct that under said case of *Sheppard v. Hawley*, "that an animal on the range, where it is placed or permitted to run by its owner, is not an estray." Which instruction the court refused to give, and plaintiff's counsel excepted. The jury then retired and returned the verdict before mentioned. In *Sheppard v. Hawley*, *supra*, it was contended on the part of the appellant, that a *breechly* or *vicious* animal running at large about the premises of a householder might be taken up and posted during any month, although the owner of said animal was well known to the person taking it up. That was the principal question this court was required to decide in that case.

The question as to what constituted an "estray" was before the court, and passed upon in its opinion. Reading the opinion of the court in that case was therefore liable to mislead them. The main point in the opinion was not at all analogous to the one involved in this case. It may have been that the Circuit Court only read to the jury the part of the said opinion bearing upon the question as to what constituted an estray; but the bill of exceptions would seem to imply that the court read the entire opinion to the jury. At all events, the jury seem to have been very much embarrassed in regard to the question. And when the appellant's counsel requested the instruction referred to, and the court refused to give it, the impression left upon their minds must have been, that the part of the opinion which the appellant's counsel had in view when he requested the said instruction to be given was not to be considered apart from the remainder of the opinion. It is apparent that the submitting of the opinion in *Sheppard v. Hawley*, as the law of the case which the jury were considering, as shown by the bill of exceptions,

was calculated to mislead them. This was error. (*Talmage v. Davenport*, 31 N. J. L. 561.)

Trial courts should not instruct juries in that manner. If they desire to adopt the opinion of a court in another case as the law of the case before them, they should copy from it the portions that are applicable, and deliver them as their own opinion of the law. To attempt to instruct a jury by reading to them from a book an opinion in another case is very liable to confuse them. The decision in *Sheppard v. Hawley*, as to what constituted an estray, is undoubtedly the law. An animal that has escaped from its owner and wanders about is an estray, within the meaning of the statute upon that subject. It becomes lost to the owner, and when it attempts to take up with a new master, and habituate itself to running at large about his premises, he is authorized, if a householder, to take it up in the manner prescribed by the statute. Counsel for appellant contends "that the legislature had no power to authorize a person to take up and dispose of animals belonging to others, as provided in said statute. He contends that the owner of property cannot be divested of his ownership in that manner."

No person can be deprived of his property except by due process of law, and an attempt upon the part of the legislature to authorize one person to take and dispose of the property of another, and thus summarily deprive him of it, would not be "due process of law," within the meaning of that expression as used in the Constitution of the State, and of the United States. But the taking up of an estray proper is not the depriving the owner of his property in a constitutional sense; it is a preservation of it for his benefit. The animal is beyond his control—is lost as to him, and is liable to perish unless taken up and cared for by some one. The person interfering with the animal under such circumstances confers upon the owner a benefit. It is a highly meritorious act when done in good faith, and the law gives the party a *claim* upon the animal for the reasonable expenses incurred, and authorizes a sale of it in order to reimburse him. The remainder of the proceeds of the sale is deposited for the owner. It is only when the law is misconstrued

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and misapplied that parties affected by it have cause to complain. Taking up animals as estrays, which are not such, is an abuse of the law, which courts and juries ought not to tolerate. An animal turned upon a range like the one referred to, and permitted to run at large, would not be an estray because its owner was ignorant of its present whereabouts. The animal is expected to roam about under such circumstances, and its particular habitation be to him a mere matter of conjecture. He does not care to know where it is, supposing that he can of course bring it in when he makes his "general round up." But if he is then unable to find it, or if it has in the mean time gone beyond the section of country in which it was expected to run, has strayed away from his other stock, and is wandering about in a distant locality, and becomes lost to him, it is an estray.

The effect of the verdict of the jury in this case was to determine that the mare and colt in question were estrays, and if the trial judge had instructed the jury as to what constituted an "estrays," when the case was submitted to them, we would not have undertaken to disturb the judgment recovered; but from what we have been able to discover from the record, we must conclude that they were not informed upon the subject beyond what they were enabled to learn by hearing the opinion in the other case read, and that contained enough different features from this to confound their understanding completely. We have considered the question raised by the defendant's counsel as to the effect of the recording of the description of the brand, and are unable to agree with the view which the counsel attempts to maintain. The object in having such a record made is to prevent other parties from using the same mark or brand. When a person has a description of that kind recorded, it is a notice to every one who may desire to adopt a brand as to the character of the one he has adopted. The statute provides that the same description shall not be recorded for more than one resident of the same county. (Misc. Laws, ch. 33, § 9.) This provision tends to secure a person in the sole use of any device he may adopt for the purpose of marking his stock. Branding stock furnishes evidence of its ownership, though it does not

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constitute implied notice of the fact. It is a circumstance which will aid in ascertaining to whom it belongs, but is not constructive notice that it belongs to the party branding it.

The judgment appealed from must be reversed and the case remanded for a new trial.

[Filed February 10, 1888.]

THE DALLS LUMBERING COMPANY, RESPOND-
ENT, v. ANDREW URQUHART, APPELLANT.

CONSTITUTIONAL LAW—EMINENT DOMAIN—PUBLIC USE.—It is not for the courts to say in what particular instances or for what particular purposes the power of *eminent domain* may be exercised. That belongs exclusively to the legislature, limited only by the Constitution, and that is the use must be *public*, and just compensation must be made.

PUBLIC USE—QUESTION FOR THE LEGISLATURE—WHETHER.—If the public interest can be in any way promoted by the taking of private property, it is in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the power of *eminent domain*, and to authorize an interference with the private rights of individuals for that purpose.

Appeal from Wasco County.

C. B. Bellinger, for Appellant.

F. P. Mays, and A. S. Bennett, for Respondent.

STRAHAN, J.—The object of this action is to appropriate so much of the defendant's land as is necessary for the line of plaintiff's canal across the defendant's premises, which is alleged to be a strip ten feet wide. The complaint shows that the plaintiff is incorporated under the laws of this State, authorizing the formation of private corporations, and that the enterprise, occupation, and business for which it was incorporated, and in which it proposes to engage, is, among other things, to construct a canal with all the necessary branches, fixtures, buildings, and

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19*	78
84*	1027
16	67
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appurtenances from the immediate vicinity of the point on the east branch of Hood River, commonly known as "Dog River," where the same crosses the township line between township 1 and 2 south, of range 10 east; thence across the divide in an easterly direction to what is commonly known as Mill Creek; thence down along the course of said Mill Creek to a point within the corporate limits of Dalles City, in Wasco County, Oregon; and to maintain and operate such canal and branches, and carry for itself and for hire, through and from all points along the same, all kinds of wood, lumber, and materials to said Dalles City, and to carry water through the same from said river to said Dalles City for the purpose of furnishing the citizens of said town during the whole year, and all others who desire to purchase the same, with wholesome fresh water, which they are now unable to procure.

The answer alleges that plaintiff's business is the constructing and operating of a *flume* between the points named in complaint, and of floating lumber, wood, and other materials manufactured by the plaintiff down said flume to said Dalles City. The said proposed flume is to be constructed for the greater part of its length of lumber, and is to be what is known as V shaped, with dimensions not to exceed three feet in height by four and a half feet on the top. That said proposed flume is not intended to be and will not be suitable for use by any boat, vessel, or water craft, or for any purpose of navigation. The reply denies the new matter in the answer. The plaintiff had judgment below, from which this appeal is taken.

1. There were no exceptions saved upon the trial in the court below. There is, therefore, no questions presented for review on this appeal except such as may be assigned on the pleadings, if any. No question is made as to the sufficiency of the verdict to cover all the issues made by the pleadings, and we cannot therefore examine that question. The verdict of the jury assesses the defendant's damages at thirty-five dollars, which amount having been paid into court by the plaintiff for the defendant, the court gave judgment appropriating the land described in the complaint to the plaintiff's use. The only question, therefore, which can

possibly arise on this appeal is, whether or not the complaint states any facts which would authorize the plaintiff to appropriate the defendant's land for the line of its canal.

2. The appellant's contention is, that the use to which this land is sought to be appropriated is a *private use* and in no sense public. No one would contend that such appropriation could be made for a use that is private and not a *public use* within the meaning of the Constitution. That instrument, article i., section 18, provides: "Private property shall not be taken for public use . . . without just compensation; nor except in case of the State, without such compensation first assessed and tendered." This is equivalent to saying it shall not be taken for private use, even though just compensation be made. It therefore becomes necessary for us to determine whether or not the taking of the defendant's property for any of the purposes specified in the complaint is a taking for *public use*.

Chapter 32, page 1432, vol. 2 of Hill's Code defines the manner and purposes for which private corporations may be formed in this State, as well as in what particular cases private property may be appropriated by such corporations. Section 3239 defines what corporations may appropriate private property in furtherance of the purposes of such corporation, and is as follows: "A corporation organized for the construction of any railway, macadamized road, plank road, clay road, *canal*, or bridge, or the conducting of water by means of pipes laid under the surface of the ground, shall have a right to enter upon any land between the *termini* thereof, for the purpose of examining, locating, and surveying the line of such road or *canal*, water pipes, or the site of such bridge, doing no unnecessary damage thereby." And section 3240 expressly authorizes such corporation to appropriate so much of said land as may be necessary for the line of such road or *canal*, or the site of such bridge not exceeding sixty feet in width, etc. Is the use to which this land is sought to be appropriated a public use? That is the only question necessary to consider. It is not for the courts to say in what particular instances or for what purposes the power of *eminent domain* may be exercised; that power belongs exclusively to the legislature,

limited only by the Constitution, and that is, the use must be public and just compensation must be made.

Says an eminent American author: "As the power to take is universal, so it is absolute; that is to say, the legislature are the sole judges of the existence of the exigency which demands the sacrifice of the rights of individuals. 'I admit,' says Mr Chancellor Walworth, 'that the legislature are the sole judges as to the expediency of exercising the right of eminent domain for the purpose of making public improvements, either for the benefit of the inhabitants of the State generally, or of any particular section thereof.'" (*Varrick v. Smith*, 5 Paige, 160.)

"It is the undoubted and exclusive province of the legislature," says the Supreme Court of the State of Maine (*Spring v. Russell*, 7 Greenl. 292), "to decide whether the public exigencies require that private property be taken for public uses." (Sedgwick's Stat. and Const. Law, 512.) Another elementary writer (Mills on Eminent Domain, § 11), states the same principle somewhat more fully: "The legislature is the proper body to determine the necessity of the exercise of the power and the extent to which the exercise shall be carried, and there is no restraint upon the power save that requiring that compensation shall be made. As soon as the court has arrived at the conclusion that the use is public, then the judicial function is gone and there is no restraint on the legislative discretion. The degree of public usefulness need not be determined by the court, or whether the proposed plan will accomplish the end desired. Statutes palpably improvident or hasty must still be sustained by the courts. . . ." And Judge Cooley's Const. Lim. page 528, maintains the same doctrine.

The legislature has declared that private property may be taken for the line of a canal, and if this is a public use the exercise of the power must be upheld. Chancellor Kent says that "if the public interest can be in any way promoted by the taking of private property, it must be in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the power of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." (2

Kent Com. 340.) So it is said by Shaw, C. J., in *Hazen v. Essex Company*, 12 Cush. 475: "In general, whether a particular structure, a bridge, or a lock or canal or road is for public use, is a question for the legislature, and which may be presumed to have been correctly decided by them. (*Commonw. v. Reed*, 4 Pick. 463.) That the improvement of the navigation of a river is done for the public use has been too frequently decided and acted upon to require authorities. And so to create a wholly artificial navigation by canals." The same case then approves the establishment of a mill power for manufacturing purposes as a public use, and cites many authorities; but as to this we express no opinion.

The term "public use" in this connection does not appear to have received an exact or precise judicial definition. The nature of the work or improvement, the surrounding circumstances and conditions, and the general policy of the State appear to have frequently exercised a controlling influence on the subject. In some of the States it has been closely restricted, while in others it has been more liberally construed. The industries of this State are in their infancy, and its resources are comparatively undeveloped, and we would hesitate before laying down a rule of construction that might retard the growth or development of either. The public certainly have an interest in the cheap delivery of the timber, lumber, and other products of the forest, or whatever other commodity may be transported by being floated to cities or other places for consumption. So in many parts of the State the use of water for purposes of irrigation is of great utility. By its use the "desert is made to blossom," and large sections of waste and unproductive land may be reduced to a state of fertility and productiveness, thus adding materially to the wealth, population, and general resources of the State. For these purposes as well as more enlarged systems of navigation by boats, canals may be useful and necessary, and in such cases it is not perceived why the power of eminent domain may not be invoked. These and other like improvements may be of just as much public utility as railroads, plank roads, clay roads, or bridges and the like, in furtherance of which the power is fre-

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quently exerted without a question. Besides this the matter of furnishing pure water to a city is of so much public concern that the power in question has always been exercised in aid of such purpose when necessary. /

We have concluded, therefore, that the complaint does state a case in which the power of eminent domain may be exercised. This conclusion has been reached, not without some doubt and hesitation, particularly on the part of CHIEF JUSTICE LORD, but we all concur in affirming the judgment, and it is so ordered.

[Filed February 11, 1888.]

J. F. BEEZLEY, RESPONDENT, v. J. B. CROSSEN ET AL.,
APPELLANTS.

PERSONAL PROPERTY—SALE OF, WHEN LEASED—EFFECT OF.—The sale of a band of sheep leased by the owner to W. does not *per se* transfer to the purchaser such lease, nor the right to any advances made by the lessor to the lessee. (Following *Beezley v. Crossen*, 14 Or. 473.)

EVIDENCE—WRITING.—Where the terms of a contract are in writing, oral evidence of what the parties thereto intended is not admissible.

ACTION FOR TORTIOUS TAKING OF PERSONAL PROPERTY—WHEN MAINTAINABLE.—Where a complaint counted on a tortious taking of personal property, and there was evidence tending to show that it was seized by the defendant O., who was a sheriff at the time, and that he so took it under a writ of attachment against the property of W., and that W. then owned a leviable interest in the same, *held*, that the taking was not tortious, and the complaint could not be upheld. *Held, also*, that an action for the interest of the respondent would arise only on a sale of his said interest by the person making the levy, when an action for the conversion thereof would lie.

APPEAL from Wasco County. Reversed.

Atwater & Story, and *A. S. Bennett*, for Respondent.

E. B. Duffer, for Appellants.

THAYER, J.—This appeal comes here from a judgment of the Circuit Court for the county of Wasco. The respondent commenced an action in that court to recover damages for the conversion of certain personal property. He alleged in his complaint “that on or about the fifteenth day of April, 1885,

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the defendants therein, these appellants, wrongfully and unlawfully took from the plaintiff, this respondent, all the following described personal property of this plaintiff, and kept and retained the same, and have converted the same, and the whole thereof, to their own use." The property referred to is described in the complaint as 2,787 pounds of wool of the value of \$348.37, and 11 wool sacks of the value of \$4.95. The appellants denied in their answer the wrongful taking and conversion of the property, and justified their taking of it, under attachment proceedings had in an action in said Circuit Court wherein the appellants, White and Heisler, were plaintiffs, and one William Wigle was defendant. They alleged in their answer the regular issuance of the attachment, its delivery to the appellant Crossen, who was at that time sheriff of said county of Wasco, and that said Crossen, by virtue thereof as such sheriff, levied upon and took the said personal property, which said defendants alleged was the same taking mentioned in the complaint. The issue between the parties to the action was as to Wigle's ownership of the property, and of its being subject to the attachment.

The case was tried by jury, who returned a verdict for the respondent for the full value of the property. Judgment was entered thereon, and the appellants appealed therefrom to this court. The appeal was heard here, the judgment reversed, and the cause remanded for a new trial. A report of the case will be found in 14 Or. page 473, which contains the main facts. It was held by this court in that case that, according to the legal effect of certain writings there referred to, the wool in question, and other wool of which it constituted a part, belonged to Joseph Beezley and William Wigle as tenants in common, each of said parties owning a one-half interest therein, subject to a deduction from the gross proceeds of the sale thereof of certain advances made by Joseph Beezley to said Wigle, and that Wigle's interest therein was liable to attachment. It was also there held that the assignments from the successive parties to the respondent, of the right, title, and interest in the sheep, did not transfer to respondent the lease under which the sheep

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were let to Wigle, nor the advances made by the lessors to Wigle under the lease; and that without proof of such assignment, the respondent could not avail himself of the benefit of the lease, or the claim of the lessors for the advances made under it. The case was remanded for a new trial, with the expectation upon the part of this court that the proof referred to would be supplied upon such trial. It appears, however, that it was not; that no proof of the assignment of the lease, or of the claim to the advances, was made any more than on the former trial. Evidence was given of the assignment of the interest in the sheep, and the respondent's counsel attempted to show that the parties to it understood that it included the lease and said advances; but the assignment being in writing, its terms could not be enlarged by parol proof of what the parties understood it to include. I have examined the testimony of the witnesses upon that subject, with a view of ascertaining whether any proof of such assignment was given, but have been unable to discover any. There was no attempt to prove it, except by Wigle and Joseph Beezley. The former intimated that he had received notice from the respondent of the transfer of the sheep, but finally concluded that he was not certain about that.

Joseph Beezley testified that respondent took the sheep under the same terms of the lease, and that he acted as agent for respondent in what he did after the assignment of the sheep. Such testimony was no proof of the fact of the assignment of the matters referred to. If Joseph Beezley assigned to the respondent the lease of the sheep to Wigle, and his claim against Wigle for his advances made under the lease, he could certainly have stated when and where the transaction took place, and the particulars concerning it. Proof of such a transaction should not be made by innuendoes, or left to conjecture. Joseph Beezley claiming to have acted as agent for respondent did not tend to prove such assignment. The affair was susceptible of direct proof, and it required that character of proof to establish it.

It would be presumed from the evidence in the case, as shown by the acts of the parties, that the assignment of the interest in the sheep to respondent was only colorable. Joseph Beezley

claims that he bought the interest of Mrs. Booth in the sheep in the fall of 1883; that they were transferred to his daughter, Alma C. Beezley, and that the latter, on the eighteenth day of March, 1885, transferred all of her right, title, and interest in them to the respondent. Under this last transfer, respondent claims his title. But it does not appear that he ever paid anything for the sheep, or took any interest in them. Wigle testified that he never saw him until after the action herein was commenced. Up to that time Wigle had had the sheep under the lease for nearly two years, during which time Joseph Beezley and Wigle seem to have had the whole management of the business. The former testified, it is true, that he was acting as agent for the respondent; but when the account was made up between him and Wigle, his agency disappeared. The advances claimed to have been made under the lease are all credited to Joseph Beezley as a principal, three items of which amounting to \$1,130 appear as having been advanced by him over a month after the pretended transfer of the sheep to respondent. The account bears date May 2, 1875, one month and a half lacking one day after the transfer from Alma Beezley to respondent. Wigle testified that he made out the account at the request of Joseph Beezley, and that it was correct. If the respondent, when the transfer was made to him, became the owner of the lessors' interest in the lease, stepped, as it is claimed, into their shoes, became the owner of the advances made prior to that time, and made the subsequent advances himself, through his agent, Joseph Beezley, why was not the account made out in his name?

The case stands here, so far as I can see, just as it stood when here on the former appeal. There is not a particle of evidence more, showing that the respondent is the owner of the lease and of the advances than there was then, outside of the vague and equivocal statements made by the witnesses referred to, which will be found, upon examination, to contain no substance whatever. It is only by virtue of the ownership of the advances that the respondent is entitled to the interest in the wool claimed. Wigle owned the half interest attached, subject to the

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payment of the advances, amounting in all to one hundred and seventy dollars, diminishing his interest therein that sum. The respondent was not in a condition to claim the benefit of the advances, without showing that they belonged to him. Slight proof of an assignment thereof to him would, under the circumstances, have been sufficient. The proof, however, should have been direct and certain, and not left to inference from general statements of conclusions. Any fact tending directly to prove it, such as a delivery over of the account to him by the owner, accompanied with a declaration of transfer, and intended as such, would doubtless have answered. But there is another difficulty in the way of the respondent's recovery in the action, if Wigle owned any interest whatever in the wool when the attachment was levied. The complaint, as will be seen, counts upon a tortious taking by the appellants, and it cannot be maintained, unless the respondent is able to prove his entire ownership in it; for whenever it is conceded that Wigle owned an interest in the wool, it disproves the alleged wrongful taking. The respondent had the right to attach Wigle's interest in the wool, however small it might be.

The respondent has no ground of complaint, except for a wrongful conversion of his interest in the property, which would arise only when a sale of it was made. Wigle having had a leviable interest in it would justify the taking of the wool and sale of such interest, and the respondent has no right of action, except for a sale of the excess belonging to him. If, therefore, he made the proof in question, he could not recover upon his present complaint, he will have to count on a conversion as suggested. This would involve the necessity of amending the complaint, which I am inclined to think, under the circumstances of the case at this stage of the proceedings, should not be permitted.

The judgment must therefore be reversed, and the cause remanded to the court below, with directions to dismiss the complaint without prejudice.

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[Filed February 15, 1888.]

GEORGE A. COFFIN ET. AL., APPELLANTS, v. CITY
OF PORTLAND ET. AL., RESPONDENTS.

CONVEYANCE—TRUST—RESULTING.—In 1865, one Coffin executed a deed of "the levee" to the City of Portland without consideration, and in trust for a public "levee" or "landing." In 1871, he executed a second deed in consideration of two thousand five hundred dollars, reciting the former one, and also releasing a ferry privilege which Coffin held on the premises. *Held*, (1) That the latter deed conveyed from Coffin to the city the reserved rights of Coffin, and operated as a confirmation of the prior conveyance, and no resulting use or trust could arise in favor of Coffin's heirs, whatever disposition the city made of the premises. (2) A condition subsequent in a deed that will under any circumstances defeat the title conveyed must provide that the conveyance is upon condition, and that the failure to perform it will operate as a forfeiture of the estate. (3) Equity will not decree a forfeiture. The remedy is by re-entry for condition broken.

APPEAL from Multnomah County.

J. G. Chapman, and *W. R. Bilyeu*, for Appellants.*W. H. Adams*, City Attorney, for Respondent, the City of Portland.*McDougall & Bower*, for the Portland and Willamette Valley Railway Company.

THAYER, J.—This appeal comes here from the Circuit Court for the county of Multnomah. It is from a decree of that court sustaining a demurrer to the appellants' complaint. It is alleged in the complaint that appellants are the heirs at law of Stephen Coffin, deceased; that said Coffin, David H. Lownsdale, and W. W. Chapman were the town proprietors of the town of Portland, and that in 1850, in laying off said town, they attempted to dedicate certain premises as a public "levee"; that they made and published a map of the town, on which they designated them as a "public levee"; that in a subsequent division of the town site among the said proprietors, the part thereof allotted to Coffin included the said "levee"; that in 1865, Coffin executed a deed of the "levee" to the city of Portland, but without consideration, and in trust for a "public levee," or landing; that in 1871, said Coffin executed a second

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deed of the levee to the city of Portland, in consideration of two thousand five hundred dollars; that the latter deed recited the former one; also, that Coffin owned the right of a public ferry on the premises, and that it was desirable that the city should hold the "levee" free from such claim; that the premises constituting the "levee," at the time said last deed was executed, were worth fifty thousand dollars, and at the time the complaint was filed, were worth seventy thousand dollars; that neither the city of Portland, the State of Oregon, nor the public had ever made any use of the premises, and each had abandoned them; that the use for which the dedication and donation were attempted to be made had failed, and that no public levee or landing could be maintained of any utility; that the attempted dedication and donation were upon condition that the premises should be used as a public landing or levee, and that they had not been so used, and that it was not intended to so use them; that in 1885, the legislature of Oregon passed an act attempting to grant the premises to the Portland and Willamette Valley Railway Company, a private corporation, for its depot, wharf, and warehouse; and that said company claims the premises under such act. Wherefore the appellants claimed that a reversion and resulting trust of the premises should be declared in their favor. It is shown in the complaint that the city of Portland has exercised acts of ownership over the "levee"; that in 1884, it caused piling to be driven along the front thereof upon the margin of the Willamette River, at the cost of four thousand dollars, and it is not pretended that the city has ever indicated any formal intention of abandoning it, or done any act from which such intention could be implied.

The inference to be drawn from the complaint in reference thereto seems to be that it cannot practically carry out the purposes of the dedication, as the appellants *term* it, nor employ it for the purposes designed, or needs it. Under one aspect of the complaint, the property was given for a particular use, and it having failed, a resulting use or trust arises in favor of the donor's heirs, which entitle them to reclaim it. Under another aspect of it, the property was given upon condition that it should

be used for a particular purpose, and it not having been so used, was a violation of the condition, and operated as a forfeiture of the estate given, and entitled the heirs to a return of it to them.

The title of the city of Portland to the premises in question is derived by the purchase of them from Stephen Coffin, and if the heirs of the latter have the right to reclaim the title granted, it arises out of the terms upon which the purchase was made. The premises were conveyed by Coffin to the city by the deeds of 1865 and 1871, and if it can be ascertained therefrom that Coffin only intended to convey to the city a partial use of the premises, reserving the residue to himself, and the complaint shows that the use so conveyed is terminated, the estate reverts to his heirs. If, on the contrary, the deeds show that Coffin intended to convey to the city his entire interest in the premises, although he limited their use to some particular purpose, and the city has divested the use to an entirely different purpose, still, neither he nor his heirs would have any right to claim a reversion of them. They would doubtless have the right to go into a court of equity and ask that the city be compelled to devote the premises to the use intended. They would not be entitled to a return of them, for the reason that the grantor had disposed of his entire interest in them, and the property would no more revert to him or his heirs in any event than to a stranger. A grantor virtually becomes a stranger to the property when he alienates it absolutely.

The effect of a deed to property depends upon the intent of the parties to it, and we must gather the intent of the parties in the transaction mentioned from the deeds referred to. The former rule was, even after the adoption of the Statute of Uses, that when one person transferred the legal seisin or possession of land to another by any of the common-law modes of assurance, without any consideration, equity presumed that he meant it to the use of himself, unless he expressly declared it to be for the use of another. (*Van Der Volgen v. Yates*, 9 N. Y. 219.) Under that rule it became important when the conveyance was made, without consideration to declare for whose use it was made. But the rule did not obtain where the conveyance was executed

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for a valuable consideration. The grantor could not have the purchase money and the land also. Thus, it is said in *Perry on Trusts*, section 151: "If a conveyance has been made upon a valuable consideration, there can be no resulting trust to the grantor, as the payment of a valuable consideration imports an intention to benefit the grantee in case the trusts declared fail, or are imperfectly declared, or do not take effect for any other reason."

It is doubtful whether the rule would prevail under our statute, which provides that "any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant." I hardly think it would, although the conveyance was made without any valuable consideration, and it certainly would not *if made* upon a valuable consideration. The two deeds from Coffin to the city cannot, taken together, be regarded as without consideration. The appellants' counsel claimed that the second one was evidently given to extinguish Coffin's ferry right in the "levee," but its recital of the former conveyance of Coffin's ownership of the ferry right on the "levee," and that it was desirable that the city should hold the property free of such claim, shows, unmistakably, that it was intended that the city should acquire an absolute title to the property, and was evidence that Coffin intended to convey every right thereto which he had not already conveyed by the former deed. I think beyond question that the latter deed was not only intended to convey from Coffin to the city the reserved rights of Coffin in the "levee," but also to operate as a confirmation of the prior conveyance. Under this view of the case, no resulting use or trust arises in favor of Coffin's heirs, whatever disposition or use may have been made of the premises. The other view suggested in the complaint that the deeds were made upon condition cannot be maintained so as to benefit the appellants.

A condition subsequent in a deed, that will, under any circumstances, defeat the title conveyed, must provide that the conveyance is upon the condition, and that the failure to perform it

shall operate as a forfeiture of the estate granted. When such a condition is broken by the grantee, the grantor is entitled to re-enter, but a court of equity will not entertain jurisdiction to declare the forfeiture. The grantor must go into a court of law if he desires to enforce the condition. Equity will not decree a forfeiture. These deeds contained no condition subsequent. The limitation of an estate to a particular use in such a conveyance does not constitute, without words of forfeiture, such a condition. (*Rawson v. The Inhabitants of School District No. 5 in Uxbridge*, 7 Allen, 128.) "Although a deed contain a clause declaring the purpose for which it is intended, the granted premises shall be used, if such purpose will not inure specially to the benefit of the grantor, but is in its nature general and public; and if there are no other words in the grant indicating an intent that the grant is to be void if the declared purpose is not fulfilled, such a clause is not a condition subsequent." (Lion, J., in *Horner v. The Chicago, Milwaukee & St. Paul Railway Company*, 38 Wis. 175.) To the same effect is the decision of this court in *Raley v. Umatilla Co.* 15 Or. 172, and it is supported by a large number of authorities there cited. Upon neither of the views considered have the appellants any standing in court. Their ancestor not only dedicated the premises to the public for a "public levee," but absolutely for a valuable consideration conveyed to the city of Portland his entire right, title, and interest in them, and by no course of reasoning can they maintain the claim they have set up, even though the city, State, and public have abandoned them, as alleged in the complaint. Parties cannot recover back property after having parted with their title to it. They have thereafter no more claim upon the property than upon property which they never owned.

In all the cases where property has been recovered back after having been conveyed by the vendor, when no fraud has been practiced upon him, it has been by virtue of a reservation, either expressed or implied, whereby a less interest than the absolute title has been conveyed, or where the estate conveyed has been fettered by some condition. A considerable discussion in this case has been had in regard to the manner in which the city of

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Portland and the public have used and treated the premises in controversy, and as to the effect of the Act of the legislative assembly of the State of 1885, mentioned in the complaint; but neither of these matters need be considered. They do not, under any view, give the appellants any ground upon which to base a claim to title, nor affect their rights any more than they do those of other citizens of the State. That the said Act of 1885 is not, when properly construed, inconsistent with the purposes of the dedication of said premises, was held by the Circuit Court of the United States for the district of Oregon, in a suit between these same parties and for the same cause. (27 Fed. Rep. 412.) Judge Deady in that case, after a very thorough consideration of the allegations in the bill of the complainants, determined, that by giving the said act effect within such powers as the legislature was entitled to exercise over the subject, and construing it accordingly as the court was bound to do, if it could, it was a grant to the railway company of the right to improve and use the premises as a public landing, with the added facility of direct and immediate railway connections therewith. This court, in *Portland W. V. Railway Co. v. City of Portland*, 14 Or. 188; 58 Am. Rep. 299, fully indorsed and adopted that view.

There is no principle better settled than that the legislature has authority to regulate the public use to which property has been devoted; and so long as it keeps within its power, the courts have no concern with its acts except to administer their provisions. And when an act is susceptible of two constructions, one of which would render it authoritative and the other a nullity, courts are bound, as Judge Deady says, to give it the former construction. The legislature is not to be presumed as having intended to go beyond its powers in the adoption of an act, and the courts will give it effect in accordance with the presumed intention of that body in adopting it, when it can be done by reasonable construction.

It follows from the reasons above given that the decree appealed from must be affirmed.

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[Filed February 15, 1888.]

**JAMES SHIRLEY, APPELLANT, v. H. C. BURCH ET AL.,
RESPONDENTS.**

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MORTGAGES—MORTGAGEE'S NAME LEFT BLANK.—An instrument purporting to be a mortgage, but containing the name of no mortgagee, cannot be rendered valid by filling in of the name of a mortgagee by an agent to whom the mortgagor had delivered the paper, with instructions to fill in the blank and obtain money from whomsoever would take it and advance the money thereon.

SAME—DELIVERY.—Where the person named as payee in a note and accompanying mortgage never had any interest in the same and knew nothing of the transaction, and the said papers were not delivered to him but were delivered to another; *held*, that the mortgage was void for lack of delivery.

FICTITIOUS PERSON NAMED AS MORTGAGEE.—Where the evidence disclosed that a person of the same name as the mortgagee named in the mortgage lived in the city where the loan was negotiated, but that such person disclaimed any knowledge of or connection with the transaction; *held*, that the payee and mortgagee are *fictitious*.

SAME—FORECLOSURE.—A court of equity will not decree foreclosure of a mortgage void in law for want of a proper mortgagee, even though the plaintiff has been imposed upon by fraudulent acts of a broker, and all the acts of the plaintiff were in good faith.

OBJECTIONS—WHEN WAIVED—APPEAL.—An erroneous decree will not be disturbed by an appellate court where no objection thereto is made by the party to be affected thereby.

APPEAL from Yamhill County.

N. B. Knight, and *J. J. Murphy*, for Appellant.

Ramsey & Bingham, for D. B. Gaunt.

Ford & Kaiser, for A. N. Gilbert and M. E. Campbell.

STRAHAN, J.—This is a suit commenced by the plaintiff against the defendants, H. C. Burch and wife, W. McGee, H. C. Wandt, Gilbert Brothers, J. A. Stratton, D. B. Gaunt, M. E. Campbell, Meier and Frank, and G. N. Townsend, to foreclose a mortgage on certain real property in Yamhill County. Burch and wife are alleged to be the makers of the mortgage, and the other defendants are alleged to have liens on the mortgaged premises subsequent to that of the plaintiff. The complaint amongst other things alleges in substance the making of the note sued on to one Joseph Chandler, or bearer, for two thousand five hundred dollars, on the 24th of March, 1882, by the

defendant H. C. Burch; the making of the mortgage to secure the same at the same time, which was executed and delivered to "said Joseph Chandler, payee, in said promissory note."

The complaint also contains the following allegation: "That the plaintiff is now the lawful owner and holder of said promissory note and said mortgage, having purchased the same for a valuable consideration long before the maturity thereof of said mortgagee, who duly assigned the same to the plaintiff by delivery to him of said note and mortgage. All of the defendants except Meier and Frank answered, denying the material allegations of the complaint, and the alleged junior lien-holders each set up his particular claim, and claimed priority over the plaintiff's mortgage. They deny the execution or delivery of said note and mortgage to Joseph Chandler, or the assignment or delivery thereof to the plaintiff, and allege that said Chandler is a fictitious person.

The cause being at issue, it was referred to take the evidence and report the same to the court, and upon the report being filed, the case was heard by the court and a decree rendered postponing the plaintiff's lien to that of all of the other lien claimants, and settling their equities and priorities between themselves, and decreeing the sale of the premises described in the mortgage to satisfy the claims in the order specified in the decree. From that decree the plaintiff has appealed to this court, and the cause has been ably argued here, both on the facts and law.

The court below found a number of facts which are stated in the record, a part of which are as follows: (1) That on the twenty-fourth day of March, 1882, the defendant executed the note described in the complaint for the sum of two thousand five hundred dollars, due in two years from date thereof, interest at the rate of ten per cent per annum, and agree by the terms thereof to pay a reasonable attorney's fee in case suit should be brought to collect the same, and delivered said note to one E. J. Dawne. (2) That on the twenty-fourth day of March, 1882, said defendant H. C. Burch executed the mortgage mentioned in the complaint with the intent on his part to secure the payment of said note, and delivered said mortgage to said E. J. Dawne;

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and that on the twenty-fifth day of March, 1882, said E. J. Dawne caused said mortgage to be filed in due form in the county clerk's office of Yamhill County, and that the same was duly recorded in the records of mortgages in said county. (3) That the interest on said note was paid up to the twenty-fourth day of March, 1884, being two years from date, but that nothing more has been paid of principal or interest on said note, and that the sum of two thousand five hundred dollars, principal and interest, at ten per cent thereon, from the twenty-fourth day of March, 1884, is now due on said note. (4) That at the time said E. J. Dawne received said note and said mortgage from said H. C. Burch, he, said Dawne, was the agent of said plaintiff, and as such agent received said note and mortgage for the plaintiff and for his use and benefit. (5) That the consideration of said note and mortgage received by said Burch was paid to him by said E. J. Dawne as the agent of said plaintiff, and that such consideration, when so paid to said Burch, was the money or property of the plaintiff, and not the money or property of Joseph Chandler. (6) That as to said note and mortgage, Joseph Chandler named as the payee and mortgagee thereof, was and is a fictitious person, who had no interest in or knowledge of the same. (7) That said note and mortgage was never delivered to said Chandler, or assigned by him to the plaintiff. (8) That said H. C. Burch, at the date of said note and mortgage, received from E. J. Dawne the full consideration of said note, and at the time believed that the same was the money or property of Joseph Chandler.

1. On the argument in this court the only questions of fact which were contested were those presented by findings numbered 6 and 7. For the purpose of determining the correctness of those findings we have carefully examined the evidence. Joseph Chandler, the alleged payee of said note and mortgage, was examined as a witness, and from his evidence it is apparent that neither the note nor mortgage were at any time delivered to him, nor did he ever see or hear of them until after the commencement of this suit, and to all intents and purposes he was an entire stranger to the transaction. It is equally apparent from Chandler's evidence that he never assigned or delivered

said note or mortgage to the plaintiff, and that the pretended assignment offered in evidence is a forgery. But appellant's counsel contend that inasmuch as the evidence tends to show that said Dawne had, before the signing of the note and mortgage, been engaged in loaning some money for Chandler, that we ought to infer that the money delivered to Burch by Dawne at the time the note and mortgage were signed was Chandler's money, and that Dawne in that transaction was acting as Chandler's agent. If the evidence left any room for such an inference for the purpose of upholding and sustaining the transaction we would cheerfully adopt it; but unfortunately for the plaintiff it does not. It does not appear from the evidence how much of Chandler's money, if any, Dawne then had in his hands; but it does appear that Dawne's authority to loan had been expressly withdrawn before the date of the note and mortgage, and there is no evidence whatever tending in any manner to prove that in taking the note and mortgage by Dawne in Chandler's name, he was acting as agent for Chandler. Chandler was entirely ignorant of the transaction, and never in any manner approved or ratified it, or claimed any interest in or benefit from it, or knew of its existence until after this suit was commenced. All the evidence in the record tends to support findings 6 and 7, and we adopt them as the findings of this court upon the points covered by them.

2. But counsel for the appellant contend that, assuming these findings of fact to be correct, the conclusions of the court below as to the law were wrong. They claim that assuming this note to have been made to a fictitious person, it is valid under section 3191 of Hill's Code, which provides: "Such notes made payable to the order of the maker thereof, or to the order of a *fictitious person*, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker, and all persons having knowledge of the facts, as if payable to bearer." There was such a person as Joseph Chandler. The evidence discloses this fact, but it discloses the further fact that he had no interest in the note, and was not intended to become a party to it. In such case, the payee is to be deemed *fictitious*. (1 Daniel on

Negotiable Instruments, § 140.) But we need not consider or decide the question of Burch's liability to Shirley on this note. The question was not argued, and we do not wish to decide it without argument. Burch's liability was not contested by respondents' counsel. Their contention was as to the validity of the mortgage, and that presents the real question in this case.

3. Appellant's counsel contend that if one make a note and mortgage complete in every particular except that the name of the payee and mortgagee are left blank, and they are then delivered to an agent with authority to procure money from any person who will advance it on the securities, that such agent may fill the blanks and deliver the note and mortgage, and that they will be enforced. (*Van Etta v. Evenson*, 28 Wis. 33; *Drumy v. Foster*, 2 Wall. 24.) These authorities support the proposition stated by counsel, but they only show that a parol authority to fill a blank by the mortgagor's agent before the delivery is good, and that authority to do that act need not be in writing. The mortgage is not delivered in blank or without the name of the mortgagee being inserted, and therefore it is not perceived how these authorities in any way support the appellant's contention. One of the first requisites of every deed is the necessary parties. There can be no deed without a grantor and a grantee, and the principle applies to all deeds, including mortgages. A mortgagee capable of holding real estate must be named in every mortgage. (1 Hilliard on Mortgages, p. 10, § 5.) So it was held in *Chauncey v. Arnold*, 24 N. Y. 330, that an instrument in the form of a mortgage, but containing the name of no mortgagee, does not become effectual by its delivery to one who advances money upon the agreement that he shall hold the paper as security for his loan. So a patent to a fictitious grantee is null and void. (*U. S. v. Southern Colorado Coal & T. Co.* 1 West. C. Rep. 11.) And the same principle is held in *Downing v. Bartels*, 2 West. C. Rep. 506; *Thomas v. Wyatt*, 31 Mo. 188; 77 Am. Dec. 640; *Kelley v. Bourne*, 15 Or. 476.

4. It has thus far been assumed that this mortgage is to be treated as if made to a fictitious person, or contained the name of no mortgagee capable of acquiring an interest in real property

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in this State, and such we think must be its legal effect. Joseph Chandler was not a party to the transaction. He had no knowledge of it. He never assented to it, nor did he in any manner authorize it. Neither the note nor mortgage was ever delivered to him, and he had no more knowledge of or interest in the transaction than if made to any other stranger. Under these facts the mortgage lacked another indispensable requisite, it was never delivered. Without delivery it could not take effect or create any valid lien upon the land described in it. Delivery is just as necessary to the completion of the transaction as the signing, sealing, or acknowledging of the mortgage. (*Goodwin v. Owen*, 55 Ind. 243; *Dole v. Bodman*, 3 Met. 139; *Eames v. Phipps*, 12 Johns. 418; *Freeman v. Peay*, 23 Ark. 439; *Chauncey v. Arnold*, *supra*; 1 Devlin on Deeds, § 260; *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281.) It is not necessary to consider what is a sufficient delivery, or what acts of the parties are requisite to constitute a delivery, for the reason that what these parties did would not constitute a delivery within any rule of law with which we are acquainted, or to which reference has been made by counsel.

5. The court in effect found that the note sued on was not made or delivered to Chandler, or by him sold, assigned, or delivered to the plaintiff, but was delivered directly to the plaintiff through the agency of Dawne. This finding is at variance with the allegations in the complaint, and if the evidence had been objected to, or if it had been contested here, the variance would have been fatal to the plaintiff's recovery on the note, on the elementary principle that a party cannot declare one state of facts and recover on other and altogether different facts. The proofs and allegations must agree. But no objections have been made to the decree against Burch on any ground, and for that reason we will not disturb it.

6. Counsel for appellant seemed to assume in his argument that the necessities of the plaintiff's case ought to furnish some reason or excuse for the interposition of equity to aid him. But this is not enough, no difference how pure may have been a party's motives, or how meritoriously he may have acted in the

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particular transaction. The rules of equity have the same certainty, and are administered with the same regularity as the rules of law, and to enable a party to obtain relief in that form he must bring his case fairly under some one or more of the acknowledged heads of equity jurisdiction.

A very careful examination of the whole case leads us to the conclusion that there was no error committed by the court below, and the decree will therefore be affirmed, except the costs will be adjudged as suggested in the concurring opinion of my brother THAYER.

THAYER, J., concurring.—The question to be determined in this case is whether the mortgage, which the suit was brought to foreclose, ever had any valid inception. It purports to have been executed by H. C. Burch to Joseph Chandler on the twenty-fourth day of March, 1882, to secure the payment of the sum of two thousand five hundred dollars, and interest, in accordance with the terms of a promissory note bearing even date therewith, which also purported to have been executed by said Burch to the order of Chandler, or bearer, and payable two years after date, with interest at the rate of ten per cent per annum, and such additional sum as the court might adjudge reasonable as attorney's fees.

It appears from the testimony in the case that Burch desired to borrow two thousand five hundred dollars; that one E. J. Dawne, then residing at Salem, wrote him that he would let him have it; that Burch came over to Salem from Yamhill County, where he resided, and signed the note, and signed and acknowledged the mortgage and left them with Dawne, who gave him the money, after taking out of it the amount of a thousand-dollar mortgage, purporting to have been executed by Burch to the appellant, and taxes, some money paid to Mr. Ramsey, and fifty dollars brokerage fees; that the remainder of the money Burch received was about eleven hundred dollars. Dawne delivered over the note and mortgage to the appellant on or about their date. That on the third day of May, 1882, the appellant duly executed, under his hand and

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seal, a written acknowledgment of satisfaction of the said thousand-dollar mortgage. Said instrument was duly acknowledged, and contains a recital that said thousand-dollar mortgage was recorded in the office of the clerk of the county of Yamhill on the fourteenth day of January, 1882. The appellant testified as a witness in the case "that Dawne came to him and asked him if he had any money to dispose of; that he told him he had; that Dawne asked him if he did not want some good paper; that he told him he did if it was good; that Dawne said it was good; that he asked him the amount it would take to lift it; that Dawne told him two thousand five hundred dollars, and he paid Dawne the money; that Dawne did not tell him what Joseph Chandler it was; that he supposed that when the note became due Dawne would collect it for him, and for that reason he gave no further thought about it.'

It appears there was, at the time of the transaction, a man residing in Salem by the name of Joseph Chandler, who lived near Dawne's place of residence, and that Dawne for some time did business for him in loaning money. Chandler was called by respondents, and testified as a witness in the suit that Dawne loaned the first money for him about 1876 or 1877; that he quit loaning money January, 1882; that he desired to use what money he had on hand, and to collect in what was outstanding, for the purpose of paying for some real estate in East Portland which he had negotiated the purchase of; that he got from Dawne thirteen hundred dollars to make up the first payment of two thousand dollars. That left a balance of two thousand dollars due on the property, to secure which he gave a mortgage; that he was unable to get any more money from Dawne at the time, as the man who had it had died, and Dawne told him he would have to wait until an administrator could sell some property to pay it; that in December, 1881, he gave Dawne instructions to collect in his money, and not to loan out any more for him; that he got from Dawne his last money, \$2,403.94, January 18, 1883; that Dawne had no authority to lend money for him after January, 1882; that he never made any assignment of the note and mortgage in suit; that he first heard of said note

and mortgage about the 1st of November, 1885; that appellant was the first one who told him about it. Burch, it appears, did not know until two years after he gave the note and mortgage but that Chandler was the owner and holder of them; Dawne continually so represented the matter to him.

This is an outline of the main facts in the case, and the counsel for the respective parties claim different conclusions therefrom. The appellant's counsel contend that the note and mortgage sued upon were intended to include Joseph Chandler as the real payee of the note and mortgagee in the mortgage, while the respondents' counsel insists that such payee and mortgagee are purely fictitious; that the name "Joseph Chandler" was so used without intending any real party. If the conclusion drawn by the appellant's counsel prevails, it presents the question whether the note and mortgage became effective in the hands of the appellant. Such instruments must be delivered to the party to whom the obligation contained therein is due before they have any force or virtue. If, therefore, said instruments had been intended for Chandler, a delivery thereof to Dawne would have been ineffectual, unless he were the agent of Chandler, and as such agent authorized to receive them for Chandler. And in order to vest the title of them in the appellant through a sale made by Dawne to him, the scope of Dawne's agency must have been sufficient to empower him to make the sale.

It is very doubtful, to say the least, whether the evidence in the case shows that Dawne was invested with any such agency. The authority to loan Chandler's money would empower Dawne to accept and receive securities therefor; but I hardly think that would authorize him to sell them, and if the testimony of Chandler is to be relied on, Dawne's authority to loan money had been revoked at the time of the transaction with Burch. If, however, these conjectures are wrong, still I am very positive that it cannot be maintained that the evidence proves that the money advanced to Burch belonged to Chandler. The testimony of the latter shows very conclusively that it did not. It shows that Dawne had at the time no money in his hands belonging to Chandler, available for any such purpose; that Chandler had

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directed him not to lend any more of his money, but to collect in what was outstanding, and pay it over to him; besides if it had been Chandler's money, and it had been intended to take the note and mortgage to him, he would doubtless have been informed in regard to the loan.

The appellant at about the time the loan was made advanced to Dawne money, he says, to buy the security, and it is very evident that that was the money which was advanced to Burch. Why Chandler's name was inserted in the note and mortgage is very peculiar; but it seems to have been an irregular mode which parties engaged in loaning money through Dawne and others had adopted. They probably considered it an honest way to do business, but the courts must consider it from a legal standpoint. The result of the transaction, if Chandler's name was used without his knowledge or consent, was to render the note and mortgage inoperative. One person cannot make a contract with another without the knowledge and consent of the latter; it must be a mutual agreement between the contracting parties. A contract in form, with a person who is a stranger to it, stands upon the same footing as an assumed contract with a fictitious person. It would lack the essential elements of a contract—the meeting of the minds of the parties.

There is but one exception to this rule that I am aware of, that is in case of a promissory note made payable to the order of the maker thereof, or to the order of a fictitious person, and negotiated by the maker. The statute gives to such note the same effect and validity as against the maker, and all persons having knowledge of the facts as if payable to bearer. But the statute does not extend to mortgages. They must be upheld, if at all, by general rules applicable to contracts. The note in suit having been made payable to bearer may possibly, under the provisions of the statute, be held valid in the hands of the appellant. The Circuit Court seems to have so regarded it, and as the respondents have not appealed from that part of the decree, it is not necessary to consider the question. A question has, however, occurred to me in considering the appeal, relative to the costs of the suit.

Points decided.

The rule of this court is, that the prevailing party in equity cases will usually be entitled to costs against the losing party; but in view of the fact that the appellant is subjected to a severe hardship in being deprived of a *lien* upon the premises for his debt; that the respondents are profited thereby; that he did not act dishonestly, or in bad faith, in the transaction out of which the debt arose, and that his misfortune has been occasioned by the bad advice he received concerning it, I think his case should be made an exception to the general rule upon that subject, and that his taxable costs and disbursements in the suit and on the appeal should be paid out of the proceeds of the sale of the mortgaged premises, with the other costs and disbursements therein, and that no costs or disbursements should be taxed against him in this court or in the Circuit Court.

[Filed February 29, 1888.]

GOVE & COMPANY, RESPONDENT, v. THE ISLAND
CITY MERCANTILE & MILLING COMPANY, AP-
PELLANT.

CONTRACT—GUARANTY—CONSTRUCTION.—In a contract to fit up a flouring mill with "improved mill machinery," for the manufacture of flour therein, it was agreed, among other things, that when the mill had been changed in accordance with the plans and specifications agreed upon, it should have a given capacity, and that the quality of the flour to be therein manufactured should be equal to that made by "any mill in Eastern Oregon." *Held*, that this guaranty was made upon the basis of the water-power formerly used in operating the mill, and that a failure to comply therewith was a good defense to an action for a deferred payment to be made upon competition and acceptance of the mill.

SAME—CONDITION PRECEDENT—WAIVER.—Where a contractor agrees to make alterations in a mill for the purpose of putting improved machinery in the same, the owner of the mill does not, by continuing the use of the mill, waive the performance of conditions precedent to a payment to be made by him for such services.

SAME—ACTION ON—DEFENSE—DAMAGES.—Where one defends an action to recover a deferred payment to be made by him upon the completion of the mill, upon the ground of a failure to comply with the contract under which the mill was constructed, he cannot recover general damages for such failure.

APPEAL from Union County. Reversed.

Rufus Mallory, and *R. Eakin*, for Appellant.

16	98
19	370
17*	740
24*	528
16	98
d35	182
16	98
44	574
44	577

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Ramsey & Bingham, and T. H. Cracford, for Respondent.

THAYER, J.—It appears from the bill of exceptions herein, that the respondents were contractors and builders, engaged in furnishing and putting up what is known as the “roller process” for manufacturing flour. The appellants had a flouring mill at Island City, Union County, Oregon, and were engaged in operating it. The mill was the old style “burr process,” was run by water-power, the water being conducted in a ditch to the mill from the Grand Ronde River.

The respondents about the last of May or 1st of June, 1886, visited the appellants at their mill, and after examining it and the water-power by which it was run, prepared and delivered to appellants a written proposition, of which the following is the substance:—

“We hereby agree to furnish you the following specified machinery and furnishings for your flour mill at Island City, in the county of Union, and State of Oregon, to wit: [Here follows description of articles.] To set up and connect machinery inside of the mill-house and elevator. The following old machinery, said to be in good repair and condition, fit for use, to wit, one thirty and a half inch Leffell wheel, one Eureka lengthened scourer, together with all old machinery, belting, and material that is good and suitable now in the mill, and owned by you, is to be used in connection with the new machinery furnished by us in the construction of the mill. We are to perform all the millwright labor necessary to set up and connect said machinery, build the necessary elevators and spoutings, and connect said machinery to the main power shaft by belt, and place the whole in good running order, and construct the required wheat, flour, and offal bins, etc.; we to raise the roof and enclose the same, putting in the necessary windows, etc.; and the millwright work is to be done in a thoroughly workman-like and substantial manner, no material to be furnished for or repairs to be made by us upon the building, except to raise roof to accommodate the machinery. We agree that the machinery and material furnished by us shall be first-class of its kind and suitable for

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the purpose used. We are to make all necessary plans for the mill, and when the mill is constructed according to said plans we guarantee that it shall have a capacity of sixty barrels of flour in twenty-four hours' time, and that the mill when it is completed shall be capable of making as good flour and as much flour per bushel of wheat as any mill in Eastern Oregon when grinding the same kind of wheat, the mill to be under our control until it is accepted by you; you to furnish wheat and bear all expenses of operating the mill from the time of starting it, and when our guarantee is fulfilled then you are to immediately accept the mill. We agree to furnish and construct as specified, for the sum of eight thousand one hundred and thirty-four and twenty-five hundredths dollars (\$8,134.25) to be paid by you as hereinafter provided. We agree to prosecute the work as fast as is reasonable, and to have the mill completed ready to run by September 10, 1886, unless prevented by circumstances over which we have no control; and that after the mill is started up, if any changes or alterations are necessary to make it fill the guarantee by reason of any failure on our part, such changes shall be made at our expense. Should any changes be made at your request or order, the additional costs, if any, over the original amount mentioned shall be paid by you.

"The terms of payment are to be as follows: Two hundred dollars in cash upon signing your acceptance of this proposition; three thousand dollars in cash when the specified new machines are delivered; two thousand dollars as called for by us during the process of the work; two thousand nine hundred and thirty-four and twenty-five hundredths dollars at the time of completion of the mill, and acceptance of the same by you of the foregoing proposition. We fully bind ourselves to its provisions.

(Signed,)

"O. C. GOVE."

The appellants accepted said proposition by written acceptance signed by them, and desired the respondents to ship machinery and perform labor as specified, binding themselves to all its terms and provisions. The action was to recover the last payment specified in the proposition, the \$2,934.25, which was to be made

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at the time of the completion of the mill and acceptance thereof, the respondents alleging that they had performed all the conditions of the said contract upon their part. The appellants denied the alleged performance of the contract, and averred the non-completion of the work, and set up a claim to damages for an alleged breach of the guarantee. Several questions were raised at the trial in regard to the construction of the contract; the rights of the appellants under the contract for a violation of its terms by the respondents; and concerning the measure of damages they were entitled to on account of such violation. The contract is clear and explicit, and in the light of surrounding circumstances is easily construed.

The respondents proposed to substitute for the process the appellants were using in their mill to manufacture flour, a new and improved process, the efficiency of which they especially guaranteed. The mill was to be under their control when constructed until accepted by the appellants. The latter were to furnish wheat, bear the expense of operating the mill from the time of starting it, and when the guarantee was fulfilled were immediately to accept it, and were then to make said last payment. The respondents were to demonstrate by a practical test that they had fulfilled their guarantee. The said payment did not mature until that was done; it was a condition precedent to the making of the payment. (*Glacius v. Black*, 50 N. Y. 145.) The respondents had no right to demand the \$2,934.25 until they had proved by actual trial that the mill had a capacity of sixty barrels of flour in twenty-four hours' time, and that it was as capable of making as good flour, and as much flour per bushel of wheat, as any mill in Eastern Oregon when grinding the same kind of wheat. This was the respondents' proposition; the proposition which appellants accepted, thereby making it binding upon both parties.

The respondents had no cause of action for the recovery of said payment until they established by proof, not only that they had furnished the material and done the work, but that they had constructed a mill with the capacity to manufacture flour in the quantity and of the quality as expressed in the guarantee.

Proof of a *substantial performance* in the furnishing of the material and constructing the mill would be sufficient. It would not be essential to the maintenance of the action in respect to those matters that there should be an exact performance of the contract in every minute particular; for, as said in Addison on Contracts, section 864, "whenever divers acts and things of different degrees of importance are to be done on one side in return for a stipulated remuneration on the other, a performance of all the things in every minute particular is not, in general, a condition precedent to the liability to make some remuneration; but if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it, the defendant being entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract." But the capacity of the mill to manufacture the amount of flour in the given time, and its capacity to make as good flour, and as much flour per bushel of wheat as any mill in Eastern Oregon from the same kind of wheat, were conditions going to the *essence* of the contract.

The appellants were evidently induced to make the proposed change in their mill in order to secure these results; otherwise they would not probably have accepted the respondents' proposition. If, therefore, the capacity or capability of the mill, when reconstructed, failed in a material particular to comply with the special guarantee, the respondents had no right of action on account of a refusal to pay the deferred payment, unless the appellants waived a performance of the condition. According to the evidence the respondents did not make the required test to ascertain whether the mill possessed the capacity and capability guaranteed. They only ran the mill a few days, and only for a few hours at one time. They claim there was not sufficient water to make the test. This might, if the water was at an extreme low stage, have excused them from making it at that time, but not absolutely.

The appellants were not responsible for the low stage of water produced from natural causes; the contract was made in view of the existing water-power. It is not true, as the court held, "that

the respondents did not agree that the mill should be capable of grinding the specified quantity, with the water and head of water then owned by appellants, or that the effect of their agreement was that the mill with an adequate motive power should be capable of grinding that quantity of flour."

The respondents proposed to put into appellants' mill a new process for manufacturing flour in place of the old one then in use, to put in the requisite machinery, make the necessary connections of the inside works, connect the general apparatus with the power which the appellants were using, and guaranteed the result mentioned. They saw what power the appellants had, and their proposition should be deemed to have been made with reference to it. If they had intended to be understood that the mill, "with adequate motive power," would have the capacity and capability guaranteed, they ought to have so framed their proposition. Upon the contrary, they said in terms, "we are to make the necessary plans for the mill, and when the mill is constructed according to said plans, we guarantee," etc. What could the appellants under the circumstances have understood, otherwise than that the mill when completed was to be run by the same water-power which they had been using in operating the old mill, and have the efficiency promised that it should possess. Of course it was not understood that the mill, when the water was so low that the usual head could not be maintained, would make sixty barrels of flour in twenty-four consecutive hours; but they must have expected that with an ordinary stage of water, such as had been sufficient to operate the old mill, they would be enabled to produce that quantity within that time. Prudent business would not be likely to subscribe to a scheme involving an expenditure of thousands of dollars, with no assurance that it could be rendered practical without laying out an additional indefinite amount. Nor did the evidence show an acceptance of the mill on the part of the appellants. The new work and materials were so intermixed with the old work that they could not be separated without entirely destroying the utility of the mill.

The contract for its construction was entire and indivisible, and the making of the payment in question was by its terms

dependent upon its completion; nor did the appellants by using the mill waive any right to demand a performance of the condition upon which the payment was to be made. In *Smith v. Brady*, 17 N. Y., Judge Comstock, at pages 188, 189, in speaking of building contracts, said: "The owner of the soil is always in possession. The builder has a right to enter only for the specified purpose of performing his contract. Each material as it is placed in the work becomes annexed to the soil, and thereby the property of the owner. The builder would have no right to remove the brick, or stone, or lumber after annexation, even if the employer should unjustifiably refuse to allow him to proceed with the work. The owner from the nature and necessity of the case takes the benefit of part performance, and therefore by merely so doing does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of the conditions precedent from the mere use and occupation of the building erected, unattended by other circumstances, is unreasonable and illogical, because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance. To be enabled to stand upon the contract he cannot reasonably be required to tear down and destroy the edifice if he prefers it to remain. As the erection is his by annexation to the soil, he may suffer it to stand, and there is no rule of law against his using it without prejudice to his rights."

If such is the rule, where a contractor engages to furnish material and construct a building on the land of another, then *a fortiori* is the rule under contracts of the character of the one in question. Here the respondents only furnished a part of the material for the mill, and combined it with the other material belonging to the appellants, and the entire structure attached to and became a part of the realty.

The right of the appellants to use the property without waiving the condition, it seems to me, is undeniable. Besides it could not be ascertained by any other mode than an actual use of the mill, whether the guarantee had been fulfilled or not. And again the appellants could not be required to permit their mill to remain idle and their business stop. It was their duty,

both to themselves and the respondents, to make the best possible use in their power of the mill; and in so doing they certainly ought not to be chargeable with having waived any condition of the contract, or of having accepted the mill under it. A considerable discussion was had at the hearing with reference to the measure of damages in this class of cases, but I do not regard the question as important in this case in view of the real issue herein. If the respondents failed to perform their contract in any material particular, they were not entitled to recover upon it, and the appellants had no claim to general damages in consequence of any such failure. They should not be allowed to refuse to make the last payment to respondents for constructing the mill, and at the same time be allowed general damages for its non-completion. If they repudiate their obligation under the contract, upon the ground that the respondents have failed to comply with its terms, they cannot claim such damages on account of the failure.

The principle is the same as that which governs in cases of the manufacture of particular articles ordered to be made in a certain manner, and when finished are found not to be in accordance with the order, and the party for whom they are manufactured refuses to receive them upon that ground. Such party would be entitled to recover back any money he had advanced upon the articles, and to recover any special damages he had suffered; but he has no claim to damages such as arise upon a breach of warranty in the sale and delivery of personal property. If the appellants had commenced an action to recover damages for not constructing the mill in accordance with the contract, and proved their cause of action, their measure of damages would have been the difference between the actual value of the mill as constructed, and what its value would have been had it been constructed as provided by the contract. (2 Sutherland on Damages, 429; *Edwards v. Collson*, 5 Lans. 324; *Ladd v. Lord*, 36 Vt. 194; *Giffert v. West*, 33 Wis. 617.) Or if the appellants in this case had set up said matter by way of counterclaim in the nature of recoupment, they would have been enabled to cut off from the respondents' claim the amount of the damages

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measured by the rule suggested; but they have no right to plead the failure of respondents to comply with the contract and overthrow their claim, and also be allowed such damages.

I do not see that the question of damages, as bearing upon the alleged failure of the respondents to comply with their said guarantee, need be considered in the trial of the action. If the said guarantee has not been fulfilled, then, as has already been stated, the respondents have no right of action for the non-payment of the last installment named in the contract; and if it has been fulfilled, the appellants are not entitled to any damages on account thereof. Upon the question of substantial compliance with the contract, and of the appellants being entitled to the deduction to enable them to complete the work in exact accordance with it, the Circuit Court seems to have entertained the correct view, except that a distinction must be made between the furnishing of the material and doing the work in constructing the mill, and the guarantee as to the capacity and capability of the mill when completed. The former matter is comparatively unimportant.

A defect in the material or work can be easily remedied; but a lack of capacity or capability of the mill is a *vital* defect and is irremediable. The fault, however, must be tangible; if it were so slight that it would not affect the utility of the mill it should be disregarded. The rule as to the allowance of damages for the loss of earnings and profits in such a case is correctly stated in *Griffin v. Colver*, 16 N. Y. 489. That case furnishes all the necessary information requisite upon that subject.

The judgment must be reversed, principally upon the error alluded to in regard to the contract having been made with reference to the water-power the appellants were using to operate their mill when the proposition to enter into it was made. The case will be remanded for a new trial, in accordance with the principles of this opinion.

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[Filed February 29, 1888.]

W. P. LOCKWOOD, RESPONDENT, v. A. HANSEN,
APPELLANT.

COSTS AND DISBURSEMENTS—MUTUAL ACCOUNTS—WHAT ARE.—A claim for a balance due for work done, after deducting a single payment, does not constitute a case involving a "mutual account," within the meaning of section 549 of Hill's Code.

APPEAL from Baker County. Reversed.

G. O. Holman, and *Shaw & Gregg*, for Respondent.

Olmstead & Anderson, for Appellant.

LORD, C. J.—The plaintiff sued the defendant in the Circuit Court for services rendered by himself and team for \$251, less the sum of \$45, to be deducted as a payment, and claimed judgment for \$206. The defendant, after making the usual denials, "except as hereinafter stated," set up that the agreement between the plaintiff and himself was, that the plaintiff was to furnish a team and driver to carry guests to and from his hotel, and that he, the defendant, was to furnish the hack and board the driver, etc., and also alleges a tender of \$36.50, which he claims is all that he owes the plaintiff under such an agreement with the deductions to which he is entitled. The reply put in issue this matter, a trial was had, and a verdict rendered for the plaintiff for the sum of \$45.50, for which the court on motion gave judgment with costs. The only question presented is the allowance of costs; the defendant contending that the sum found to be due the plaintiff under the agreement being less than \$50, he was not entitled to costs under subdivision 5, section 549, of Hill's Code, and the plaintiff contending that the matter in litigation was an open, mutual account, and under subdivision 3 of that section, being more than \$150, the judgment for costs was allowed and there was no error. According to the plaintiff's statement this is not a case of mutual accounts, but simply a claim for a balance due for work after deducting a payment of \$45 as stated. Payments on a claim are not items of account in favor of the party making them, and the plaintiff

16	102
19	60
17*	102
23*	6:50

16	102
40	601

certainly cannot claim that effect for them. Accounts are said to be mutual where each party makes charges against the other in his books for property sold, services rendered, and money advanced. (*Edmondstone v. Thompson*, 15 Wend. 556.)

In the language of an elementary writer, "mutual accounts are made up of set-off. There must be a mutual credit founded upon a subsisting debt on the one side, or an express or an implied agreement for a set-off—mutual debts. . . . There must be a mutual, or as it has been expressed, an alternate course of dealing. Where payments on account are made by one party, for which credit is given by the other, it is an account without reciprocity, and only upon one side." (Angell on Limitations, § 149.) So that taking the statement of the plaintiff as an account for services rendered, the balance for which he sues shows that the payment was appropriated and left nothing outstanding except such balance. Upon this theory the defendant had no claim against the plaintiff. But he seeks now to construe it as a mutual account by considering it in connection with the matter set up in the answer. The answer, however, only shows what the real agreement was between the parties, and that the defendant kept his part, and offered or tendered payment of what he conceived to be the balance due the plaintiff.

There is nothing in the transaction which indicates there was mutual dealings or accounts and reciprocal demands between the parties. If the plaintiff had sued on account for services rendered, and the defendant had set up items as a set-off or counterclaim growing out of their mutual dealings, which constituted an affirmative claim in favor of the defendant, a case, so to speak, where each party had a claim against the other upon which either party might sue, it would come within the meaning of mutual accounts. As it is, we do not think this is a case to which the subdivision of the section referred to can apply.

It is claimed by the defendant that the plaintiff was not entitled to recover costs under subdivision 5 of section 549, because the amount recovered was less than fifty dollars, and that it was error to refuse or deny his motion for costs. Section 541 provides that costs are allowed of course to the defendant in

the actions mentioned in section 549, unless the plaintiff is entitled to costs therein. Under subdivision 5 of section 549 in an action for the recovery of money or damages to entitle the plaintiff to costs, he must recover fifty dollars or more. The plaintiff in this case recovered less, and was not entitled to costs, and according to section 541, *supra*, he was entitled to costs of course. This would seem to be the plain reading of the subdivision and sections referred to, although it seems that subdivision 5, *supra*, has been subject to some fluctuation of prejudicial opinion in New York, whence the section with its subdivisions were taken. (See *Kalt v. Lignot*, 3 Abb. Pr. 190. *Contra*, *Crane v. Holcomb*, 2 Hilt. 271; *Thayer v. Holland*, 63 How. Pr. 180.)

In *Crane v. Holcomb*, *supra*, it was held that in actions for the recovery of money unless the plaintiff recovers fifty dollars or more, the defendant is entitled to costs, of course, and that a judgment entered in favor of the defendant for his costs, after deducting the sum found due the plaintiff, was regular. Helton, J., said: "The plaintiff's right to costs, of course, is not dependent merely upon his being the prevailing party, but rests entirely upon the fact whether in an action falling in the subdivision referred to, he recovers fifty dollars or more." In this case the recovery being under fifty dollars it is very clear that the plaintiff is not entitled to costs, and as section 305 provides that "costs shall be allowed, of course, to the defendant in the action mentioned in the last section, unless the plaintiff is entitled to costs therein, it seems equally clear that the judgment in the action in favor of the defendant was properly entered, and the motion to vacate it must be denied." An appeal being taken from this decision to the general term, Daly, J., said: "As the plaintiff by the fourth subdivision of the three hundred and fourth section is not entitled to costs, it follows in my judgment, as a matter of course, from the three hundred and fifth section that the defendant is entitled to costs. The fourth subdivision of section 304 declares in effect that the prevailing party shall not recover costs in actions for the recovery of money, unless he recover fifty dollars or more; and the next section, 305, provides that if in such action the plaintiff is not entitled to

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costs, that costs shall be allowed to the defendant. These two sections are clear and explicit, and are not controlled by anything contained in section 303." And this, too, seems to be the construction in *Baine v. City of Rochester*, 85 N. Y. 526, although the point was not directly involved, in which the court say: "By the fourth subdivision of section 3228, the plaintiff is entitled to costs in an action on money demand other than those previously specified, provided he recovers fifty dollars or more; and by section 3229 the defendant is entitled to costs in an action specified in section 3228, unless the plaintiff is entitled to costs as therein specified."

It follows that it was error to allow the plaintiff costs, and the judgment must be reversed, with directions to enter judgment in accordance with this opinion.

[Filed February 29, 1888.]

STATE OF OREGON, RESPONDENT, v. EDWARD
NORTON, APPELLANT.

SUNDAY—INDICTMENT DATED ON.—An indictment dated on Sunday is not void under the statute making Sunday a non-judicial day; the defect is only formal at most, if at all, and could only be taken advantage of by proper motion before trial.

APPEAL from Multnomah County. Affirmed.

Henry E. McGinn, for Respondent.

W. L. Nutting, and *R. J. Eaton*, for Appellant.

LORD, C. J.—The defendant was indicted, tried, and convicted of the crime of burglary. A motion in arrest of judgment was filed, and after argument denied by the court, and the defendant sentenced to imprisonment in the penitentiary for the period of three years. The indictment states all the facts material to be alleged to constitute the offense with which the defendant is charged, and ends in this wise, stating such facts: "Dated at Portland, the county aforesaid, this thirtieth day of

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January, 1887." The thirtieth day of January, 1887, was Sunday, and the objection raised is that the indictment is void because dated on Sunday. In the press of business, it is probable that the district attorney availed himself of that day to draw this, and perhaps other indictments, and inadvertently dated it on that day, or it may have been done by mistake. However that may be, it is of little consequence. By the Code of Criminal Procedure, the date is made no part of, nor is it a fact necessary to be stated to make a valid indictment. The time and place, etc., in the charging part of the indictment are specified, and every other material fact necessary to be alleged to make out the crime of burglary. The date when the indictment purports to have been drawn is of no significance, as it shows itself by indorsement that it was not presented and filed until the fifth day of February, 1887.

It is made the duty of this court to give judgment without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. (Hill's Code, § 1449; *State v. O'Neil*, 13 Or. 183.) The date being no fact necessary to be stated to constitute the offense, could not operate to affect any right of the accused, or prevent him from having a fair and impartial trial. At most if at all, the defect is only formal, and waived if not taken advantage of by motion before trial. Merely technical errors or defects which could not have affected the guilt or innocence of the accused, or have prevented an impartial trial, cannot be made the basis of a new trial, much less for arrest of the judgment. If we may give it that importance, it requires something more than a mere defect in form to authorize a court to grant a motion in arrest of judgment. To do that, it must appear, (1) that the grand jury which found the indictment had no legal authority to inquire into the crime charged, because the same is not triable within the county; and (2) that the facts stated in the indictment do not constitute a crime.

As the date referred to here constitutes no part of the facts necessary to be stated to constitute the offense charged, the motion was properly denied, and there being no error the judgment must be affirmed.

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[Filed February 29, 1888.]

STATE OF OREGON, RESPONDENT, v. JOHN PHENLINE, APPELLANT.

16	107
128	184
17*	572
37*	537

CONSTITUTIONAL LAW—TITLE TO ACT—STATUTES—AMENDMENTS.—An act entitled "An act to amend section 14 of title 1 of chapter 28, General Laws of Oregon, . . . as amended October 17, 1876," is not repugnant to the Constitution, article iv., section 20, which provides that "every act shall embrace but one subject and matters connected therewith, which subject shall be expressed in the title," when taken in connection with article iv., section 22, of said instrument, which provides that "no act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at length."

SAME—INTOXICATING LIQUORS—SALE OF, TO MINORS.—An act of the legislature entitled "An act to prohibit the selling or giving of intoxicating liquors to minors, without the written consent of parents or guardians," Laws of 1874, section 686, as amended in 1877, makes the prohibition to "sell or give intoxicating liquors to minors" absolute under article iv., section 20, *supra*.

APPEAL from Washington County. Affirmed.

Thomas A. McBride, District Attorney, for the State.

Handley & Huston, *contra*.

THAYER, J.—Appeal from a judgment of conviction obtained in the Circuit Court for the county of Washington. The appellant was indicated and convicted in the said Circuit Court for disposing of intoxicating liquor to a minor, contrary to the act of the legislative assembly of this State, entitled "An act to amend an act, to amend section 14 of title 1 of chapter 28, General Laws of Oregon, being section 686, chapter 8, Criminal Code, published in 1874, by authority of the legislative assembly of the State of Oregon, as amended October 17, 1876," approved February 16, 1887. The appellant claimed in the Circuit Court that said act under which he was indicated was unconstitutional and void, and made that one of the grounds of his defense to the indictment. The Circuit Court held that the act was valid, and upon that question the case is brought to this court. The appellant's counsel contend that the title to an amendatory act, which merely refers to the law to be amended by number of section, does not express the subject of the act as required by the Constitution of the State. They contend also

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that the title of the original act does not express the object of the amendatory act.

The Constitution of this State provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." (Art. iv. § 20, State Constitution.) The title of the original act is: "An act to prohibit the selling or giving of intoxicating liquors to minors, without the written consent of parents or guardians." It was passed in 1864, took effect by operation of the Constitution, January 20, 1865, and is included in the General Laws of Oregon, as published in 1864, as section 14 of title 1 of chapter 28, thereof. The amendment of 1876 is entitled "An act to amend section 14 of title 1, of chapter 28, General Laws of Oregon, being section 686, chapter 8, Criminal Code, published in 1874, by authority of the legislative assembly of the State of Oregon." Which amendment was approved October 17, 1876.

The amendment of 1887, under which the appellant was indicted, has already been set out above. The provision of the Constitution referred to was not designed to prevent the legislature from including different subjects in the same act, so much on account of the objection to an act embracing more than one subject, as to prevent the smuggling into a bill, provisions of a pernicious character, and foreign to the object indicated in its title, or with freighting it with matter which has no merit. It was to avoid loading onto a wholesome measure, subjects which otherwise would not receive legislative sanction, that led to the adoption of the restriction. Requiring the subject of the act to be expressed in its title tends to thwart such practices in legislative affairs, as it renders them nugatory if it is not observed. All of the departments of the State government under our system are only so many agencies, and the acts of those who administer them, like the acts of other agents, have no power or efficacy when done outside of the scope of their authority. The Constitution has wisely set a limit to the power of all the functionaries of the State; it has circumscribed it by a paling of privileges and restrictions which marks the boundary, and if they overstep it, although acting under color of office, their acts

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are no more binding than though they had never been clothed with authority. Whenever an alleged right is claimed under such a usurpation, and is sought to be enforced in a court of justice, it cannot legally be maintained.

If a legislative body in this country attempts to enact a statute in violation of any of the provisions of the Constitution, and a right is attempted to be upheld under it in a court of justice, it is the duty of such court to declare such pretended statute null and void. All legitimate deductions drawn from rational logic sustain this conclusion. But courts will not pass upon so important a question hastily, nor pronounce a statute unconstitutional, unless in a clear case, admitting of no reasonable doubt, and will give every just intendment in its favor; but when in the opinion of the court, there is an irreconcilable conflict between the statute and the Constitution, the latter must necessarily prevail. The principal question in this case is whether the said provision of the Constitution is applicable to a statute which is amendatory of a section of an original one. Said provision must be construed with reference to other provisions of that instrument, relating to the same matter. Section 22 of said article iv. provides that, "no act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length." This provision of the Constitution relates specially to amendatory statutes; while the former one is general in its terms, and would seem to apply more particularly to original acts—acts to which the title expressing their object is prefixed at the time of their adoption. Amending a section of an existing act requires no new title; the same title applies as much to the act as amended, as it did to the original one, and the title expresses the subject of it, unless there has been a clear departure and complete change of substance from the original. Is, therefore, the subject of such an amendatory statute anything more than the changing of the substance of a section in an existing one? and is not the constitutional requirement answered in such case when the section as amended is "set forth and published at full length?"

The question does not turn upon the construction that would

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be given to said section 20, which requires the subject to be expressed in the title of the act if standing alone. The two sections must be taken together, and it seems to me, that it would not do violence to the Constitution to construe it as intending that it is sufficient in amending a section of an existing law to designate such amendment as the subject of the amendatory act. I think it may clearly be inferred from the language of said section 22 that if an amendment were made in conformity therewith, it would be regular and valid without any further expression of the subject in its title. I think the language of the section last referred to implies that an act *may* be revised, or a section be amended by setting it forth and publishing it at full length, and that its title need not indicate any further object. Such seems to have been the course pursued by the legislature of the State in many instances where statutes have been amended, and which would be determined unconstitutional if we were to hold as insisted upon by the appellant's counsel. A hypercritical view of the subject would certainly not be justifiable when such mischievous consequences must necessarily result from such holding. Upon the other objection to the validity of the act that the subject of it under the amendment is not expressed in the title of the original act, I do not think there can be much question. The title of the act is "to prohibit the selling or giving of intoxicating liquors to minors, without the written consent of parents or guardians." This clearly indicates the object and purpose of the act, which was not certainly to allow the selling or giving to that class of persons, intoxicating liquors upon the written consent of their parents or guardians; but to inhibit it in all cases, except where such written consent had been given. The written consent was a sort of special license under which the right "to sell" or "give" might be exercised, and the amendment took away this right, rendering the prohibition to "sell or give intoxicating liquors to minors" absolute.

The amendatory act is more restrictive in its terms than the original one; but the end and aim of each was the same. The other matters prohibited in the amended act are properly con-

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nected with the subject thereof, and it was not necessary that they be expressed in the title.

It is apparent that the general design of the original act, and of the various amendments thereto, was to prevent a pernicious practice from becoming prevalent in the community, which was liable to have an injurious effect upon the health and morals of the youth of the country, and prove detrimental to the general welfare of the State. It is a subject towards which all the legislation mentioned has been directed. Some changes have been made in the provisions of the original act, and its title is not strictly appropriate to it as amended. The words "without the written consent of parents or guardians" have no application to anything contained in the body of the act as it now stands; but they might have been dispensed with in the outset, and the title still been sufficient; it would have expressed the subject of the act without them sufficiently to answer the constitutional requirement, and their remaining as a part of it does not, as I can perceive, affect its validity as amended.

The counsel for the appellant contend that the title of the original act, without anything in the title of the amended acts, indicating in what particular the provisions of the former were changed, would be misleading. But if parties interested in the matter had no other source of information than that imparted by the titles of several acts referred to, they would have sufficient to put them upon inquiry, and could easily ascertain what provisions had been adopted, if desirous of observing them. Parties, however, in this State, as a matter of fact, have other sources besides the session laws from which to acquaint themselves with the legislative enactments. A policy was adopted four or five years after the State organization began the exercise of its functions, which has ever since been maintained, of periodically collecting and publishing under legislative authority, in the order and method of a Code, the general statutes in force, under their appropriate heads and titles, also a syllabus of each section at the beginning of each chapter or title, as the case may be, and a well digested alphabetical index of the whole. Statutes collected and published in that manner have usually been

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amended by reference to the section, title, and chapter as thus arranged. That was the mode pursued with respect to the adoption of the amendments under consideration, and I can discover no grounds of objection to it whatever.

The legislative assembly, in order to render statutory enactments more easy of access and conveniently understood, has adopted provisions for arranging them as mentioned, and an amendment thereof by such reference conduces to their intelligibility. A mere reference to the statute as originally published in a majority of cases would create confusion. A great majority of the session laws that have been published are accessible to but few persons. I do not believe that the Constitution intends the observance of a nicety, which if adhered to would occasion embarrassment. There is no such sanctity attending the publication of an act of the legislature as would prevent its republication in a more convenient form, or preclude a reference to it in that form, in event of an amendment. That the subject of an act is ascertained from its title is a mere theoretical hypothesis at most, and the claim that the object of requiring the title to express it is to enable legislators to vote understandingly upon it, and to inform the community as to what measures are pending before the legislative assembly, for its action, as often asserted, although practically true, is not strictly correct in theory. An act, as suggested by the respondent's counsel, may not have the same title of the bill for the act.

The final question upon the passage of a bill is, "shall the title of the bill stand as the title of the act?" which takes place after the legislators have done all their intelligent voting upon the measure, and the community obtained all the information which the title is supposed to furnish; and yet the title of the bill may not "stand" as the title of the act—it may not express the "subject" of the act. Such a character of information theoretically would, therefore, be very unreliable. But the purpose of the requirement need not be considered; it is a mandatory direction which the legislature must obey. When such a body undertakes to give to its acts the force and effect of law, it must follow the mode prescribed by the instrument which created it.

I think it did so in the adoption of the act in question substantially, and that it is a valid law.

The judgment appealed from will therefore be affirmed.

[Filed February 22, 1888.]

OREGON AND WASHINGTON MORTGAGE SAVINGS BANK, APPELLANT, v. THOMAS A. JORDAN, SHERIFF OF MULTNOMAH COUNTY, AND MULTNOMAH COUNTY. RESPONDENTS.

VERIFIED LIST OF TAXABLE PROPERTY—HILL'S CODE, SECTION 2769.—The verified list required under this section to be furnished the assessor by a tax-payer does not constitute an assessment when received by the assessor. It simply aids him in obtaining a true description of taxable property, and is evidence from which the assessment may be made.

ASSESSMENT—WHAT IS.—Property is not assessed though on a verified list until it is set down in the assessment roll as required by section 2770 of Hill's Code.

BOARD OF EQUALIZATION—ITS POWERS AND DUTIES.—The board of equalization, in making the proper corrections under section 2779 of Hill's Code, may place on the assessment roll property of a taxpayer which had been omitted by the assessor, or not assessed, and this without the three days' notice to such tax-payer. Notice is requisite only when the valuation of property already assessed is raised.

TAXATION—JURISDICTION OF EQUITY.—Before equity will interfere to enjoin the collection of a tax, the facts presented must disclose a case falling under some recognized head of equity jurisdiction, such as the preventing a multiplicity of suits, removing cloud from title, or the like, or it seems illegality of the tax.

ASSESSOR—ACTS JUDICIALLY IN VALUATION OF PROPERTY, and their determinations are binding in cases where they have jurisdiction until reversed or set aside by some tribunal having authority to review their action.

REMEDY OF TAX-PAYER.—The remedy of the tax-payer in all ordinary cases for errors in his assessment is to go before the board of equalization, and failing to obtain redress, to seek it by writ of review. (*Rhea v. Umatilla County*, 2 Or. 298, and *Poppleton v. Yamhill County*, 8 Or. 338, approved.)

APPEAL from Multnomah County.

McDougall & Bower, for Appellant.

McGinn & Simon, for Respondents.

STRAHAN, J.—The object of this suit is to enjoin the collection of a tax. The material part of the complaint is in substance as follows: That on or before August 25, 1884, plaintiff furnished and filed with the assessor of Multnomah County, a full

16	113
16	464
17*	621
19*	458

16	113
23	392
24	463
17*	621
31*	965
33*	681

16	113
22	418

16	113
30	254
30	310

16	113
33	144
34	554

16	113
30	192

16	113
44	84
44	92

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statement of the property of the plaintiff, and duly sworn to as required by law; that said statement contained all personal property except shares of stock in Portland National Bank, which plaintiff believed were assessed to said Portland National Bank; that the assessor of Multnomah County returned a list of assessable property as required, and the board of equalization examined the same and made the following assessments: Money, notes, and accounts, \$118,210; real estate, \$24,000; mortgages, \$63,670; and allowed an indebtedness within the State of \$145,280, and leaving total taxable property of \$62,600; that on said sum of \$62,600, there was levied a tax of \$, and a warrant for its collection placed in the hands of Thomas A. Jordan; that at the time said assessment was made, the plaintiff had no property in the county of Multnomah subject to assessment and taxation, the whole thereof being offset by deduction of indebtedness; that nearly all of plaintiff's property consists of notes secured by mortgage, and that the same are taxable in the counties where the lands securing the same lie, and that said assessment of \$118,210 was arbitrarily made and was erroneous as to all in excess of \$50,000; that said assessment is erroneous, excessive, and unjust, and the taxes levied thereon are an apparent lien and cloud on the title of the plaintiff's aforementioned real estate; that thereafter said assessment roll, with the warrant of the County Court attached, was placed in the hands of defendant Thomas A. Jordan, sheriff of Multnomah County, for collection; that he returned said tax as delinquent, and the county clerk has as by law directed, issued a writ under his hand and with the seal of the County Court attached thereto, directed to said sheriff, commanding him to levy on the goods and chattels of the plaintiff, and if none be found, then upon the real property of the plaintiff, and that said Jordan will, unless restrained, etc.; and that plaintiff has no plain or adequate remedy at law, and pray that defendant be restrained. Upon the filing of the complaint a restraining order was issued.

The defendants demurred to the complaint for the reasons: *First*, the same did not contain facts sufficient to constitute a cause of suit; and *second*, there is a misjoinder of parties defend-

ant, in that the county of Multnomah is joined as a party defendant. The demurrer was overruled, and the defendants refusing to answer, and electing to stand by their demurrer, a final decree was entered in favor of the plaintiff, enjoining the collection of the taxes assessed against the plaintiff in Multnomah County for the year 1884. This decree was entered on the 21st of September, 1887, from which this appeal is taken.

1. Section 2769 of Hill's Code makes it the duty of any person liable to be taxed in his county to furnish the assessor a list of his real estate situate in his county liable to taxation, and a list of all his personal property liable to taxation in this State. This list is to be verified by such person, that to the best of his knowledge and belief such list contains a "full and true account of all his property liable to be taxed in such county. . . ." The receiving of this list by the assessor is not an assessment of the property. It is simply a part of the means provided by law to aid the assessor in discovering and obtaining a true description of the property liable to taxation in his county. If satisfied of its truth and correctness, it is evidence upon which the assessor may act in making the assessment, or he may act on his own knowledge or institute further inquiries until all of the property of each tax-payer in his county is placed upon his tax roll. The property is not assessed until it is set down in the assessment roll as provided by section 2770 of Hill's Code.

Section 2778 of Hill's Code declares what officers in the county shall constitute the board of equalization, and section 2779 declares a part of the duties of such board as follows: "If it shall appear to such board of equalization that there are any lands or other property assessed twice, or in the name of a person or persons not the owner thereof, or assessed under or beyond its actual value, or any lands, lots, or *other property not assessed*, said board shall make the proper corrections." Waiving for the present the more important question of the jurisdiction of a court of equity to correct improper assessments by injunction under the facts disclosed, the complaint is open to serious criticism. What is meant by "a list of assessable property as required?" There is no such document known to the assessment laws of

this State. The official record of the assessor's work is the *assessment roll*, which he is required to return, and it may be inferred that that is the document which was before the board of equalization. By the terms of section 2779, *supra*, said board has power to make the proper corrections amongst other cases, when any land, lots, or other property has not been assessed. This language was evidently designed to confer upon the board power to make the necessary corrections by assessing the property where it has not been assessed, and this power has been constantly exercised by boards of equalization throughout the State. The power conferred by this section is clearly distinguishable from that conferred by section 2780, which gives the board power to "increase the value of any property so assessed" upon three days' notice.

In the one case, if property is omitted from the roll it may be placed there and a proper valuation placed upon it, and this without notice. In the other, the property being found upon the roll and valued by the assessor, that valuation cannot be changed or disturbed without the requisite notice. The board may have erred, but so far as appears from the record before us, it had the power to place on the assessment roll, property other than that returned thereon by the assessor, and so far as appears, that is the action complained of here.

2. As a general rule, equity has nothing to do with the correction of erroneous assessments. Aside from the requirements of the statute, public policy requires that the revenues should be promptly assessed, and collected by those officers and through those agencies which the law has specially provided for that purpose. Unless, therefore, a case can be brought by its particular and peculiar facts under some one of the heads of equity jurisdiction, such as the preventing a multiplicity of suits, removing cloud from title, or the like, equity will not ordinarily interfere unless the tax be illegal. The remedy prescribed by statute in most cases will be found ample and expeditious, and in such cases it ought to be exclusive. Burroughs on Taxation, section 102, states the rule thus: "*Errors, what tribunal corrects.* Where the assessors have jurisdiction of the persons or property assessed, they act judicially, and like the judgment of any other tribunal,

their acts are conclusive until reversed in the mode prescribed by law. Whether the error be in the valuation of property at too high a rate, or upon a wrong principle, or of property which is claimed as exempt, the decision of the assessor cannot be attacked collaterally. The remedy is by appeal to that tribunal provided by statute, and if there be none provided, then it is by *certiorari*." And this principle seems to be supported by many authorities. (*Stewart v. Maple*, 70 Pa. St. 221; 1 High on Injunctions, §§ 488, 492, 493; *Hughes v. Kline*, 30 Pa. St. 227; *Macklot v. City of Davenport*, 17 Iowa, 379; *Merrill v. Gorham*, 6 Cal. 41; *Porter v. R. I. & St. L. R. R. Co.* 76 Ill. 561; 2 Desty on Taxation, 661; *Waterbury Savings Bank v. Lawler*, 46 Conn. 243; *Seeley v. Town of Westport*, 47 Conn. 294; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Mayor etc. of Brooklyn v. Meserole*, 26 Wend. 130; *State Railroad Tax Cases*, 92 U. S. 575; Cooley on Taxation, p. 542.)

3. This court held, in *Rhea v. Umatilla Co.* 2 Or. 298, that the assessor and clerk constituted a tribunal, whose decision might be reviewed by proceedings taken for that purpose under section 573 of the Code as it then stood. In that case the court further said: "The clerk and assessor sit as a tribunal after public notice has been given that they will then make an adjustment of valuations, and any aggrieved property holders ought to appear and seek redress for *wrongful* or *improper assessments*. When they do so seek a correction and are not satisfied with the decision, the law provides no other remedy, but to avail themselves of the writ of review, and that, too, within six months after the decision." And *Poppleton v. Yamhill Co.* 8 Or. 338, is to the same effect.

The plaintiff could have appeared before the board of equalization of Multnomah County then, and made such showing as would have induced that tribunal to make all necessary and proper corrections in its assessment, and upon its refusal to do so, it could have sued out a writ of review and brought the questions finally before the court. This was the plaintiff's remedy, and the only remedy under the facts disclosed by the complaint, if such facts under any circumstances furnished grounds for

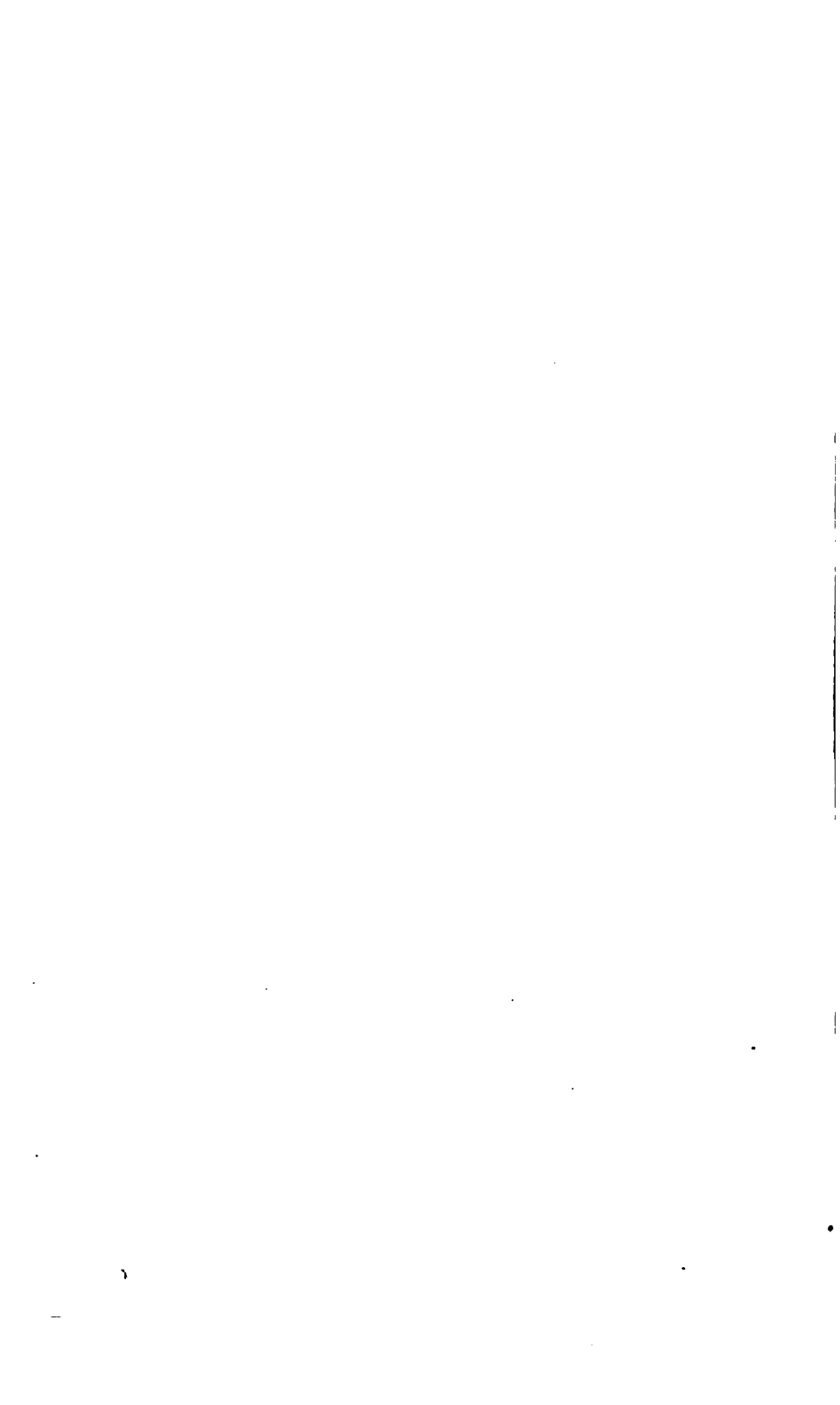
Opinion of the Court—Strahan, J.

relief. No authorities have been cited showing that a party is entitled to relief by injunction under the facts disclosed by the plaintiff, and it is believed that none have gone so far.

In reaching the conclusion indicated, we have not overlooked *Dalton v. East Portland*, 11 Or. 426; *Stingle v. Nevel*, 9 Or. 62; or *Brown v. School District No. 1*, 12 Or. 345. These cases in all their essential conditions are clearly distinguishable from the one now before the court; nor is it intended by anything that is here said to impair the force of those cases under the particular facts disclosed by each. We are satisfied for the reasons above given that the complaint furnished no ground for equitable interference to enjoin the tax complained of.

The decree must therefore be reversed and the suit dismissed.

MARCH TERM, 1888.



CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

OREGON.

MARCH TERM, 1888.

[Filed March 6, 1888.]

ANSON WOODS, RESPONDENT, v. W. F. COURTNEY,
APPELLANT.

BILL OF EXCEPTIONS—MOTION FOR NONSUIT—EVIDENCE.—Unless it affirmatively appears from the bill of exceptions that it contains all the evidence offered upon the trial, this court will not review the action of the trial court in refusing to order a nonsuit.

VERDICT—PRESUMPTION—EVIDENCE.—Unless the contrary is made to appear affirmatively, this court is bound to presume there was evidence sufficient to authorize the verdict.

VERDICT—EFFECT OF.—A verdict conclusively settles every issue in favor of the party in whose favor it is rendered.

APPEAL from Wasco County.

Bennett & Wilson, and O. F. Paxton, for Respondent.

H. Y. Thompson, for Appellant.

STRAHAN, J.—This is an action for malicious prosecution. The plaintiff had a verdict for one hundred and fifty dollars, upon which judgment was entered, from which this appeal is taken. We have carefully examined the record, and are unable

16	191
27	117
29	149
29	962
16	191
33	193
18	121
35	138
16	121
41	546

Opinion of the Court—Strahan, J.

to find that the court below committed any error that is reviewable on this appeal. At the conclusion of plaintiff's evidence the defendant moved for a nonsuit, which was refused, and this is assigned for error. In looking through the bill of exceptions it is difficult to find any evidence which would sustain or justify a verdict for the plaintiff; but all the evidence is not in the bill of exceptions, or at least it nowhere appears from the record that the evidence given upon the trial accompanies it. We are therefore unable to review the action of the court in refusing to grant a nonsuit. Unless the contrary is made to affirmatively appear by the record, we are bound to presume that there was evidence sufficient to authorize the verdict. The verdict conclusively settled all the issues made by the pleadings in favor of the plaintiff, and this court cannot review the findings of the jury upon those questions.

The appellant's counsel relies upon his exception to the charge of the court, to the effect that the testimony of Anson Woods was not material, and therefore in law could not be perjury. The evidence which is in the bill of exceptions to which the instruction is supposed to refer is presented in such a manner that it is impossible for us to say whether it was material or not. It does not relate to any issue in the case, and if material, could only become so on some collateral inquiry. Whether it did become material in that way it is impossible for us to determine on the record before us.

The court fully and correctly instructed the jury as to the law on every point in the case, and while we might differ with the jury as to their conclusions of fact, we have no power to disturb the verdict for that reason.

Let the judgment of the court below be affirmed.

Opinion of the Court—Thayer, J.

[Filed March 7, 1888.]

**H. L. HOLGATE, RESPONDENT, v. OREGON PACIFIC
RAILROAD COMPANY, APPELLANT.**

A PRIVATE CORPORATION being the creature of the statute may be sued in such manner as the legislature may provide. The statutes of Oregon prescribe a mode for the commencement of an action against parties, including corporations, and it must be pursued in order to confer jurisdiction upon the court over the person of the defendant.

CORPORATION—WHERE SUABLE.—Section 44 of the Civil Code of the State, which provides that “the action shall be commenced and tried in the county in which the defendants, or either of them, reside, or may be found at the commencement of the action,” applies to corporations as well as to natural persons, except so far as the former are affected by subdivision 1 of section 55 of the Code.

DOMICILE.—The residence of a corporation is deemed to be in the county where it has its principal office or place of business.

VENUE.—A corporation organized under the laws of the State must be sued in the county where it has its principal office or place of business, or in the county where the cause of action arose.

APPEAL from a judgment of the Circuit Court for the county of Multnomah.

George W Yocum, for Respondent.

Whalley, Bronough & Northrup, for Appellant.

THAYER, J.—The appellant is a private corporation, constituted as such under the laws of the State, having its principal office at Corvallis, in the county of Benton. The respondent attempted to commence an action against the appellant in the said Circuit Court, to recover a small amount of indebtedness alleged to be due him from it. He filed his complaint thereon in the office of the clerk of said Circuit Court, and issued a summons in the usual form, notifying the appellant to appear and answer the complaint. The summons was delivered to the sheriff of said county of Multnomah, and thereafter at said last mentioned county served upon Wallis Nash, second vice-president of the appellant, intending the same as a service upon the latter. The appellant failed to appear in accordance with the notice contained in the summons, whereupon a default and judgment for the amount claimed in the complaint were entered against it, and from which judgment this appeal was taken.

16	123
30	319
16	193
31	477
16	123
38	54
38	57
16	123
46	139

Opinion of the Court—Thayer, J.

The counsel for the appellant present two questions for the consideration of this court upon the appeal, viz.: "(1) Can a corporation, organized and incorporated under the laws of this State, and having its principal office or place of business in a certain county, be sued or served in transitory actions in a county other than that in which its principal office is situated? (2) If it can, was the attempted service upon Wallis Nash, second vice-president of the defendant corporation, service upon the head of the corporation, the president and first vice-president being absent, notwithstanding the affidavit and showing of Wallis Nash that he was not the head of the corporation at the time of the service?"

A corporation being the creature of the legislative assembly can be served with process for the purpose of commencing an action against it, in such manner as that department may prescribe. (*Cairo & Fulton Railroad Co. v. Hecht*, 95 U. S. 168.) It has prescribed the mode of service of such process, and the only question to be considered is whether the attempted service referred to was made in compliance therewith. Section 44 of the Code, last compilation, provides that "in all other cases (referring to transitory actions), the action shall be commenced and tried in the county in which the defendants, or either of them, reside, or may be found, at the commencement of the action; or if none of the parties reside in this State, the same may be tried in any county which the plaintiff may designate in his complaint." Section 54 of the Code, same compilation, provides that "the summons shall be served by the sheriff of the county where the defendant is found," and section 55 of the Code provides that "the summons shall be served by delivering a copy thereof, together with a copy of the complaint, prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows: (1) If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, or managing agent, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found

in the county, or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent."

These are all the provisions of the Code which bear upon the question, and we must ascertain therefrom what the legislature meant and intended by adopting them. They constitute separate sections of the Code, but as they relate to the same subject should be construed together. It cannot be maintained that under said section 44 the service was sufficient to bind the corporation, as the action was not attempted to be commenced in the county where the defendant resided or was found. The residence of the corporation, if an artificial person can be said to have a residence, must be deemed to be in the county of Benton, where it has its principal office and place of business, and where it is required to pay its taxes. It has its entity in that county, which is permanently fixed until a change is made in its charter. Mr. Nash certainly did not take the corporation with him when he went to Portland and was served with the summons, whatever his official position in the institution may have been; and by no fiction even can it be maintained that the appellant was found in Multnomah County upon that occasion. If the attempted service of the summons, therefore, was sufficient in law, it must be found to be so under said section 55 of the Code.

In construing the latter section the circumstance of its amendment in 1876 may be taken into consideration. The original provision upon the subject is included in section 54 as compiled in 1874. By the amendment all the language contained in subdivision 1 of said section 55, after the words "managing agent," was added thereto, and it is well understood by the older members of the bar why such addition was made. The business of railroad corporations in particular generally extended through other counties than the one in which the principal office was situated, where stations were established, and clerks and agents located to transact the local business connected with their roads.

Controversies between the corporations and individuals arose, of course, in these various counties, which had to be adjusted in the courts; but owing to the fact that the officers the legislature

Opinion of the Court—Thayer, J.

had designated as the persons upon whom service of summons is required to be made in such cases could not always be found in the county in which the controversy had its origin, it was difficult to commence the action there, and the right to do so in a county other than that in which the principal office was situated was then seriously controverted. In order, therefore, to avoid such inconvenience and to settle the right to sue a corporation in the county where the action arose, without regard to the location of its principal office, the amendment was adopted. It authorizes beyond question the commencement of an action against a corporation in any county in which the cause of action arose; but as was said in *Parke v. Commonw. Insurance Co.* 44 Pa. St. 422, in construing a similar statute: "That corporations should be liable to be sued in any county . . . by any plaintiff who may choose to sue them there, whether the claim originated there or not, is surely beyond the intention of the legislature."

It is necessary in the commencement of an action against a corporation under the Civil Code of this State, in order to acquire jurisdiction over the person, that the return of service of summons show that a duly authenticated copy thereof, and of a copy of the complaint, were delivered to one of the officers thereof designated in said subdivision 1 of said section 55 of the Code, either in the county where its principal office is situated, or in the county where the cause of action arose, or in case none of such officers shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county where the cause of action arose, or if no such officer be found, then by leaving such copies at the residence or usual place of abode of such clerk or agent.

The action may be commenced in the county where the corporation has its principal office, whether the cause of action arose there or not, because that is its place of residence. In that case, however, the service must be made upon the president, or other head of the corporation, secretary, cashier, or managing agent thereof; but if commenced in a county where the cause of action arose, the service may be made upon a clerk or agent under the

Points decided.

circumstances and in the manner above mentioned. The return to the summons not showing the facts here indicated, the service was insufficient to give the Circuit Court jurisdiction over the appellant. Whether Mr. Nash comes within the designation of president, or other head of the corporation, or managing agent thereof, it is not necessary to consider, as it was not attempted to commence the action in the county where the appellant has its principal office, and the service could not be made upon him as agent or clerk, as the cause of action did not arise in the county of Multnomah.

The judgment will therefore be reversed and the complaint dismissed.

[Filed March 9, 1888.]

PETER G. CHRISMAN ET AL., PROPONENTS, v. W. S. CHRISMAN ET AL., CONTESTANTS.

WILL CAPACITY—PRESUMPTION.—When a will is shown to have been duly executed, there arises a presumption of sanity in favor of the testator, which, at this stage of the proceedings, unless rebutted or overcome by counter-evidence, will be sufficient to authorize the probate of the will.

INSANITY—BURDEN OF PROOF.—When in a civil proceeding the question of sanity and insanity is directly in issue, while giving to the general presumption in favor of sanity all that may fairly be claimed for it, the burden of proving sanity is upon the party who asserts it.

TESTAMENTARY CAPACITY.—Testamentary capacity is mainly a question of fact, to be determined from a consideration of all the evidence. The testator must have sufficient capacity to comprehend the conditions of his property, his relation to the persons who were should, or might have been the objects of his bounty, and the scope and bearings of the provisions of his will. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of. Old age, sickness, distress, nor debility of body do not incapacitate provided the testator has possession of his mental faculties and understands the business in which he is engaged. The real point in issue is testamentary capacity or incapacity at the precise date of the transaction. What his mental condition was before and after executing the will is only important, as it throws light upon his mind, and shows its actual condition when the will was executed.

16	127
19	126
22	108
18*	6
23*	852
29*	268

16	127
24	178
18*	6
33*	543

16	127
31	369

16	127
37	445

16	127
40	504
40	578

16	127
42	857

Opinion of the Court—Lord, C. J.

WILL—POWER TO MAKE.—The law gives to every man of sound mind the right to dispose of his property by last will, and this is regarded as one of the most efficient means which he has in protracted life or old age to command the attention due to his infirmities.

APPEAL from Lane County.

J. E. Fenton, W. R. Willis, and Ramsey & Bingham, for Proponents.

L. & W. R. Bilyeu, for Contestants.

LORD, C. J.—This is a proceeding brought for the purpose of having an order of the County Court, admitting the will of C. E. Chrisman to probate, vacated and annulled, and to declare it void and of no effect. The will was executed on the twenty-sixth day of November, 1884, and the testator died on the twenty-first day of June, 1885, and left surviving him, a wife and seven children. On the twenty-fourth day of June, 1885, the said will was duly admitted to probate in common form, and the executors thereof having duly qualified, entered upon the discharge of their duties in administering the estate. Subsequently, and on the eleventh day of November, 1885, the contestants filed their petition to the effect: (1) That the said will was not properly executed; (2) that at the time the same was executed, the testator was of unsound mind; and (3) that the will was procured by undue influence. The answer, after denying these facts, alleged affirmatively that the will was executed with the formalities required by law; that the testator was of sound mind, and that the said will was his free and voluntary act and deed. This affirmative matter being denied, and the cause thus at issue, it was referred by the court to a referee to report the testimony. After taking the testimony the referee filed his report, and the County Court proceeded to try the issue, and on the fourth day of October, 1886, adjudged and decreed that the order made on the twenty-fourth day of June, 1885, admitting said will to probate, be vacated, and that the will be declared null and void. Upon appeal to the Circuit Court, the decree entered therein was reversed, and the said will admitted to probate as the last will and testament of the said decedent,

and from this decree of the Circuit Court the present appeal is taken.

The record of this case is voluminous, and the work of reviewing and digesting the mass of testimony it contains has been difficult and onerous. Much of this, no doubt, could have been avoided by restricting the latitude of examination and confining the testimony of the numerous witnesses to the matter in issue. Although by the pleadings, as already outlined, there are three distinct questions suggested for determination, an examination of the record has disclosed, and in fact the argument here has confirmed, that the contest is waged mainly about only one question, namely, whether the testator was of sound mind at the time the will was executed. Our statute of descents gives the property of a decedent to his heirs unless divested by a will, and our statute of wills provides that no one can dispose of his property by last will who is not of sound mind.

When a will is offered for probate, and the mental capacity of the testator to make it is denied and contested, there usually arises the preliminary question, upon whom rests the burden of proof. Upon this point there is much confusion and contrariety in judicial thought, nor is it free from difficulty. There is a general presumption, it is said, in favor of mental soundness, and that usually the burden of proof rests upon the party denying it, whether the question arises upon a will or contract, or upon a trial for crime. This presumption is based on the idea that sanity is the normal condition of the intellect, and that insanity is exceptional and abnormal, hence the general presumption in favor of sanity or mental soundness.

The contestants claim that the *onus probandi* is upon the proponents, not only to show that the will offered for probate was executed according to law, but that the testator was of sound mind when he executed it. As we are satisfied that the will was executed with the formalities required by law, the further consideration of that phase of the subject may be eliminated. The contention of the contestants assumes that an executor in offering a will for probate impliedly asserts that his testator is of sound mind or mentally competent to execute a valid will, and

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that while it concedes to him the benefit of the presumption of sanity, it does not relieve him of the burden of proving it when called into question, or thereby cast upon the opponents of the will the burden of affirmatively proving insanity. "When a will is shown to have been duly executed," said Prim, J., "the law presumes the competency of the testator." (*Greenwood v. Cline*, 7 Or. 26.) This is nothing more than saying that when a will is shown to have been duly executed, there arises a presumption in favor of the sanity of the testator, which at this stage of the proceeding, unless rebutted or overcome by counter-evidence, will be sufficient to authorize the probate of the will.

As Mr. Schouler on Wills says: "When the will is shown to have been properly executed and witnessed, it may be fairly presumed that the testator was competent and unrestrained in the disposition of his property; but that these presumptions being of fact, or mixed law and fact, may be rebutted, and the proponent has nothing more than a *prima facie* case in his favor." (Schouler on Wills, § 174.) But in *Hubbard v. Hubbard*, 7 Or. 44, it was said by the same judge, when the validity of the will as here is attacked by a direct proceeding, that "in every such proceeding the *onus probandi* lies upon the party propounding the will, and he must prove every fact which is not waived or admitted by the pleadings, necessary to authorize its probate in the County Court. Whatever may be the form of the issue as to every essential and controverted fact, he holds the affirmative." In *Perkins v. Perkins*, 39 N. H. 171, Bell, C. J., after reviewing the authorities, said: "It is therefore proper to say that the burden of proving the sanity of the testator, and all the other requirements of the law to make a valid will, is upon the party who asserts its validity. This burden remains upon him until the close of the trial, though he need introduce no proof upon this point until something appears to the contrary." This doctrine that the burden of proving sanity when denied and contested rests upon the executor, or whoever sets up the particular will in controversy, was very ably asserted and maintained by Thomas, J., in *Crowninshield v. Crowninshield*, 2 Gray, 524, and has been frequently approved and followed. (See, also,

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Rigg v. Wilton, 13 Ill. 15; 54 Am. Dec. 419; *Cilley v. Cilley*, 34 Me. 162; *Robinson v. Adams*, 62 Me. 369; 16 Am. Rep. 473; *Cramer v. Crumbaugh*, 3 Md. 491; *Morrison v. Smith*, 3 Bradf. 209; *Delafield v. Parish*, 25 N. Y. 32; *Baldwin v. Parker*, 99 Mass. 84; 96 Am. Dec. 697; *Comstock v. Hadlyme*, 8 Conn. 254; 20 Am. Dec. 100; *Evans v. Arnold*, 52 Ga. 169; *Beaubien v. Cicotte*, 8 Mich. 9; *Garvin v. Williams*, 44 Mo. 465; 100 Am. Dec. 314; *Williams v. Robinson*, 42 Vt. 658; 1 Am. Rep. 359; *Renn v. Samos*, 33 Tex. 760; *Jenkins v. Tobin*, 31 Ark. 306; *McMeechen v. McMeechen*, 17 W. Va. 683; 41 Am. Rep. 683; *In the Matter of the Will of Convey*, 52 Iowa, 197; Redfield on Wills, 28, 30; Schouler on Wills, §§ 169, 174; 6 Wait's Actions and Defenses, 383; Abbott's Trial Evidence, 113, 114.) Such, also, seems to be the English rule.

In *Barry v. Butlin*, 1 Curt. Ecc. 637, Baron Park said: "The rule of law, according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and that they have been acquiesced in on both sides. These rules are two; the first that the *onus probandi* lies in every case upon the party propounding the will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator." "Whether the party propounding a will," said Cresswell, J., "relies upon a *prima facie* case, or gives the whole of his proof in the first instance, the *onus* remains on him throughout." (*Sulton v. Saddler*, 36 Barb. 87; *Wallis v. Hodgeson*, 2 Atk. 56; *Ogle v. Cook*, 1 Ves. Sr. 177; *Jackson v. Hesketh*, 2 Stark. 518; *Fulton v. Andrew*, Law R. 7 H. L. 448; 12 Moak E. R. 76; *Hodges v. Holder*, 3 Camp. 366.) So that although numerous authorities may be cited *contra*, the rule deducible from these to which we have referred, while admitting the presumption of sanity to exist, when in a civil proceeding the question of sanity and insanity is directly in issue, fixes the burden of proving sanity throughout the entire trial upon the party who asserts it. And Mr. Schouler says in his excellent work already referred to, that "the larger and better class of American authorities point to the conclusion that the court or

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jury trying the case must, upon the whole evidence, be satisfied that the testator was of sound mind; so that if there be inevitable doubt left on this point from all the testimony, the will cannot be considered as proved." And adds that "this conforms to the English rule as stated." (Schouler on Wills, § 147, n. 5.) So that testamentary capacity is mainly a question of fact, to be determined from a consideration of all the evidence in conformity to the principle as already stated. Before recurring specially to the evidence, there are some facts which lie on the surface of the record that need to be mentioned.

It appears that the testator with his wife and children emigrated from Missouri to Oregon in the year 1851, crossing the great plains with ox teams. After some changes of residence during the first years he finally settled in Lane County, of this State, where he accumulated a large estate, and died at an advanced age. The facts indicate that he was a man of but meager education, but possessed of a vigorous understanding, and much energy and decision of character. To these qualities he joined habits of great industry, strict economy and sobriety, and vigilant attention to his own affairs and business interests. As a result of such a combination of traits he early began to acquire property and to make money, which he prudently managed and safely invested, and thus continued to do and to accumulate without much abatement almost to the day of his death.

It is no doubt true that he "loved money," and was indefatigable in the pursuit of its acquisition, but his sound judgment and strong sense of right and justice made him an honest man. In all his dealings and conduct, so far as this record discloses, although always keenly alive to his own interests, and when menaced, ready to take the aggressive for their protection or security, there is no imputation of bad faith or trick on dishonesty. A man always of decided principles, his convictions were strong and not easily influenced, and being self-reliant and of a somewhat logical turn of mind, he rarely took counsel from others, but formed his own opinions, to which he adhered and from which he was seldom converted by the opinions of others.

A character of this kind absorbed in business pursuits, and devoted for many years to the acquisition of wealth, dominated by a robust and energetic mind, but not devoid of the social affections and virtues which render domestic life attractive, could not fail to attract attention and become a commanding figure in the small community in which he resided. As a consequence he was quite generally known throughout his county, and died one of its wealthiest citizens. In such case, any marked deviation in his habits of thought, or any aberration of mind indicative of incapacity to transact ordinary business, would have been readily noticed and remembered, and the decisive proof of it would have been easy and accessible. Now what is the nature of the facts, or the character of the evidence by which it is sought to be shown that the decedent was incapable of executing a valid will.

A short time prior to his death, and when he was nearly seventy-four years of age, the will in controversy was executed. It was written at the request of the decedent by Mr. Joel Ware, who had been acquainted with the testator for over a quarter of a century, and had been clerk of the Circuit Court for that county for nearly an equal period. Scarcely any one could have been selected under the circumstances more suitable to have written the will. His personal intelligence and high character, his long personal acquaintance with the testator, and his knowledge of legal matters as an officer of the court, are an assurance that he understood and appreciated the business he was called upon to perform, and comprehended his duty and what the law expected of him; and that if the testator had been of unsound mind, and surrounded by interested and obtruding advisers, he would have noticed it, and doubtless have refused to write it, or at least suggested it be deferred to some other time. His testimony is clear, explicit, and unimpeached.

It is not possible to state it in detail, but in substance it goes to the effect that the will was dictated by the testator; that he understood the nature of the business, the property he had, upon whom he intended to bestow it, and the manner he meant to distribute it between them. Mr. Ware testifies that he had

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been intimately acquainted with and transacted business for the testator at intervals for twenty-seven years; that about the 22d of October, 1884, he received a letter from the testator asking him to come to Cottage Grove to rewrite his will (he had written a will for him some ten or twelve years before), and that he, on the 26th of October, 1884, accordingly went and arrived at the house about three o'clock, and found the testator had gone to the postoffice, whither he went and returned with him to his house. "When I got ready to write the will, Mr. Chrisman said to me: 'Now, Ware, I tell you what I want in that will, and I want you to put it into shape so that it will stick.' I wrote down as he told me until we came to the bequest to Chrisman F. Chrisman, when I suggested to him the allowance two hundred dollars per year appeared small, as it would only be about one fourth of the interest of the amount left him. He said, 'if you think so, hold on a minute.' He then got up, walked the floor, went out on the sidewalk, and after walking back and forward a few times he came in and told me to put it down; that it was sufficient to support him, and that every dollar he got over that would go. I then suggested that in case of sickness or disability it would not be sufficient. He said, 'that is so; I hadn't thought of it; fix it so that the trustees can give what in their judgment may be necessary in case of sickness or disability.' I made no further suggestion, *simply put in shape what he told me to put down.* After the will was written, I read it over to him section by section. He told me not to seal the will that night, and in the morning before I left he had me to read the will to him again, said he believed it was all right, but not to seal it as he wanted to read it by himself. That no one was present but Mr. Chrisman and myself, and Mrs. Chrisman was in and out of the room at times, and that Mr. Chrisman dictated the will, and the whole of it, and that he referred to no memoranda or paper while he was dictating it. That the old will I had before me, I think a will I wrote some twelve years before, and that the general drift of the two wills was the same, some small change in amounts, and a change in executors.'

Upon the question as to his sanity at the time the will was

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written and before that time, and after, etc., he testified: "The question of his sanity or insanity never entered my mind until after his will was probated. I saw no difference in him mentally from what I had known for twenty-seven years. I always considered Mr. Chrisman sane. In all his business transactions I never saw anything that to my mind would indicate insanity or mental weakness." After explaining about the former will, the correspondence which passed between him and the testator, and some deeds to certain property which he had written in answer to the inquiry as to his business capacity, he testified: "I never saw anything in his business habits to indicate any mental weakness. I always considered him a safe business man." Answering the inquiry as to his firmness, and the tenacity with which he contended for his own particular views on questions of business or otherwise, he said: "He was a man who did his own thinking. He would frequently *ask me how to do certain things, but he never asked me what things to do.* As to the disposition of his property, I inferred from his words and actions that he wished to dispose of his property in the manner he told me; the same as I set down in the will, and that he wished his property to descend to his blood relations." And again, "that he wanted to leave the children all well fixed and comfortable in this world's goods, and after that he wanted the balance of the property to go to those of the children whom he thought would be most likely to take care of it. I understood that to be his motive all through both wills. In my judgment, this is the key to the motive which prompted him to make the unequal distribution of his property by will, and which is undoubtedly the real ground of complaint against him."

It is not possible to review at any greater length the testimony of Mr. Ware, and we must content ourselves with saying that the examination of his evidence has satisfied us that the reasons which he assigned for the opinions expressed as to the sanity of the testator, and his capacity to transact business, are founded on facts and circumstances detailed from which no other rational or logical conclusion can be drawn, and that his long and intimate acquaintance gave him the opportunity to observe

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any variation in his mental vigor, so that, if any existed, especially when he was called upon to write a will, which was to be the final disposition of the testator's property, he would not only have detected it, but his admitted intelligence and integrity of character are such that he would have esteemed it his duty to have made it known. Yet it never occurred to this witness, who knew he was enfeebled by age and disease, that there was any decay of his faculties or such mental incapacity as unfitted him to make a valid will. What constitutes testamentary capacity or "sound mind" within the meaning of the law has been repeatedly settled by this court. (*Heirs of Clark v. Ellis*, 9 Or. 128; *Hubbard v. Hubbard*, 7 Or. 42.) The testator must have "sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will." (*Converse v. Converse*, 21 Vt. 168; 52 Am. Dec. 58.) He "must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment in relation to them." (*Delafield v. Parrish*, 25 N. Y. 9.)

"The phrase 'sound mind,'" said Sir James Hanner, "covers the whole subject, but emphasis is laid upon two particular functions of mind which must be sound in order to create capacity for the making of a will, for there must be memory to recall the several persons who may be supposed to be in such a position as to become the fitting objects of the testator's bounty; above all, there must be understanding to comprehend their relations to himself, and their claims upon him." (*Broughton v. Knight*, Law R. 3 Pro. & D. 64; 6 Moak E. R. 350.) This probably is about as correct a definition of the law as any given, but it is merely a reiteration in a different phrase of what has been repeatedly expressed by other judges. The difficult question is to determine what degree of mental capacity will entitle a person to make a will. The exposition of the law, as contained in the

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case of *Stevens v. Van Cleave*, 4 Wash. C. C. 267, 268, was approved and adopted in *Clark v. Ellis*, 9 Or. 128, by this court, and I find it frequently repeated and followed as a correct definition of testamentary capacity in other cases.

Mr. Justice Washington said: "He (the testator) must, in the language of the law, be possessed of a sound and disposing mind and memory. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding in any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he has been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and digest all parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this, had he a disposing memory? was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, was his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed the will?" (*Harrison v. Rowan*, 3 Wash. C. C. 580; *Redfield Am. Cases on Wills*, 53; *Rice v. Rice*, 50 Mich. 448; *Freeman v. Easty*, 117 Ill. 317; *Will of Blakeley*, 48 Wis. 294; *Brinkman v. Ruegge-sick*, 71 Me. 553; *Brown v. Riffin*, 94 Ill. 560; *Schouler on Wills*, §§ 67-74; *Redfield on Wills*, pp. 120-135.) Other authorities might be cited, but these are sufficient to show the standard of capacity upon which the law insists to entitle a person to make a valid will. And it is noticeable, and needs to be

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emphasized, that in "deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of." (*Harrison v. Rowan*, 3 Wash. C. C. 585; *Sloan v. Maxwell*, 2 Green Ch. 570; *Van Alst v. Hunter*, 5 Johns. Ch. 159; *Den v. Vanderve*, 2 South. 660; *Banks v. Goodfellow*, Law R. 5 Q. B. 562.)

That great age and bodily disease and afflictions may impair the mind or destroy its functions, rendering it unfit to transact ordinary business, is not disputed. But if such is the case, it it must be shown, it cannot be assumed; for the law is well settled "that neither old age, sickness, nor extreme distress or debility of body incapacitate, provided the testator has possession of his mental faculties and understands the business in which he is engaged. The test is the integrity of the mind, not the body." (Redfield on Wills, 97, 102, 125.) It often happens that aged and infirm persons, who seem to have lost nearly all memory on different subjects, when their attention is once fixed upon their own property, business, or family, understand them well. (Taylor's Medical Jurisprudence, 336.) In such case, the only effect of extreme old age is to excite the diligence of the court to inquire more closely into his mental capacity.

As to the testator's physical health there is little divergence of opinion among the witnesses; all agree that it was feeble, and that his mind was not so alert and vigorous as formerly, and some think it was so impaired as to incapacitate him to transact ordinary business, although the reasons some of them assign for such opinion is not entitled to so much weight. To entitle a witness' opinion to much consideration, he must have knowledge of what testamentary capacity means, "else," as Paxton, J., said, "no man's will would be safe." (*Eddy's Appeal*, 109 Pa. St. 406.) Although evidence prior and subsequent to the making of a will is admissible for the purpose of throwing all possible light on the subject, to enable the court to determine whether the will in controversy was executed by a sound mind,

yet it is not to be forgotten that testamentary capacity or incapacity at the precise date of the transaction is the real point at issue. (Schouler on Wills, § 186.) Hence, great weight is attached to the testimony of subscribing witnesses; for they have the opportunity to observe the mental condition, and all the circumstances surrounding the execution of the will. (Schouler on Wills, § 179.) But the final decision of the case does not depend on them, but upon all the evidence adduced.

They may all deny the sanity of the testator, and yet if the proof of a sound condition of mind is shown by the whole evidence, the will must be upheld. (*Perkins v. Perkins*, 39 N. H. 169; *Thornton v. Thornton*, 39 Vt. 122.) Shortly after his will was drawn by Mr. Ware, the testator executed it in the presence of four witnesses who were his neighbors and friends, and whom he had invited to his house for that purpose. When they had assembled, he produced his will and said: "Gentlemen, this is my will, and I desire each one of you to witness my signature, and also each other's signatures." That he then signed, and the witnesses signed, one of them at his request filling in the dates.

These subscribing witnesses had all known him for many years, lived in the same village, and frequently saw him, knew that his health was feeble, and that he sometimes complained of pains in his head and kidneys; was accustomed to his ways, to conversing with him, and hearing him converse with others, and enjoyed unusual opportunities to observe any failing of his mental powers, or indications of mental weakness to which he might expose himself, and we may reasonably suppose that if they had harbored any suspicion that he was losing his mind or incapable of transacting ordinary business, they would have been on the alert and ready to make a memorandum of it on their minds on such an occasion as had called them together; yet none of them noticed anything in look, gesture, talk, or conduct that gave the slightest indication of incapacity or mental weakness; nor does it seem that any suggestion of that kind ever occurred to their minds. On the contrary, the facts and circumstances as they occurred, and are narrated by these

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witnesses, what was said and done, shows as conclusively as any occurrences of this kind usually do, that he fully understood and comprehended the nature of the business in which he was engaged, and the purpose for which he had invited them to his house. Not one of them at that time had the faintest idea that he was insane, much less had formed an opinion upon any facts or acts of his from which insanity was reasonably inferable. It is his capacity at that time to make his will which is the real point at issue. What his mental condition was before or after executing it is of no importance, only as it throws light upon his mind, and shows what its actual condition was when the will was executed. "Saw nothing wrong," nor "unusual," "thought he understood what he was doing," is the language of all these witnesses at the precise date when the will was executed.

It is true, several months after when this contest was begun, some of them at the time their testimony was taken expressed an opinion that he was of unsound mind at the time the will was executed; but it expressly appears that such opinion was not formed until a long time afterwards, nor do they claim otherwise. But the reasons assigned for such opinions are not entitled to a moment's consideration in law. This can be well shown by illustrations from the evidence. "Well, from what I have heard, I don't know what my opinion is. From what other men say who had dealings with him, I think something was not right with him in some way. *From what I have heard since* I don't think his mind was altogether sound at the time he signed the paper."

This opinion is not only based on hearsay but since the execution of the will, and is utterly worthless in law. More, it is in direct contradiction of the opinion he formed of the testator at the time the will was executed, and when he saw and observed the facts of which he testified. "I noticed nothing unusual in his conversation at the time, it seemed to be his free will; understood what he was doing. I suppose he was all right at the time; that was my opinion at that time." Another of them says: "From what the old man told me *since* he made his will in regard to the division he made with his children, etc., I believe

there was something wrong." He depreciates as another witness does his incompetency to judge of his sanity, and says he does not understand what "a sound and disposing mind means." But it is perfectly manifest from his testimony that he did not consider him of unsound mind at the time of the execution of the will, but "from the knowledge I have got since," he says, "I am satisfied there was something wrong somewhere." Another says: "I thought nothing of the matter at the time, that is, his sanity at the time the will was signed, and for that reason could not have any opinion at all about the matter."

These references must suffice, but they are sufficient to show how valueless these changed opinions are for any purpose of this case. Based not on facts observed but hearsay, or the injustice of an inofficious will, formed long after its execution, and the after-thought of neighborhood discussion, in flat contradiction of the impressions they formed at the time, from what they saw and observed of the testator's capacity to make a will, and their solemn act in the attestation, such opinions are without legal or other merit, and must be disregarded. The facts and circumstances occurring at the execution of the will, and as narrated by them, are consistent with mental soundness, and this was the impression which such facts then produced on their minds, and is the best evidence of his sanity. At the argument a good deal of reliance was placed on the testimony of Dr. Whiteaker as tending to establish *smile dementia*.

There is no doubt that the testator during the last year or so of his life was in feeble health, suffering some, and complaining a good deal, and at times peevish and querulous. But in examining the doctor's testimony it is important to note that it touches but two distinct periods, one in July, 1884, and the other in his last sickness, in which he undertakes to speak directly as to his mental condition. All other is speculative and inferential; nor does the doctor undertake to say what the actual consequence was, or would be, but only to state upon the data he had, what study and experience in that particular subject had indicated to often follow as the result of such symptoms or condition. For the uncontradicted facts remain that the tes-

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tator, between the periods noted, often went on the streets of his village again, talked and dealt occasionally with his neighbors and friends, and attended public meetings, political and otherwise, and did those things usually done by persons of his age and condition, unnoticed and unsuspected by any one of insanity, or any such mental blindness as unfitted him for the ordinary transactions of life.

There is besides this his correspondence upon various matter within this period, to which we shall presently refer, that shows as conclusively as any act of the human mind can, that he had not only memory to retain and state facts which concerned his family, his will, and his business with accuracy, but to reason upon them with a sense and judgment which showed that he fully comprehended his own affairs and business, and possessed the capacity to direct and control them.

"In July, 1884," the doctor says, "*I believed his mind was affected, and during his last illness I knew his mind was affected.*" But he does not undertake to say what his mental condition was in the *interim* or at the time the will was executed, or do more than infer from the symptoms observed the consequences which might follow. But we all know, and the authorities already cited, and to which many more might be added, show that old age, and the ills of distress, debility, and sickness, which often accompany it, do not incapacitate if the testator has possession of his faculties and understands what he is doing, and that such a condition may exist without perversion of the judgment. (*Sloan v. Maxwell*, 2 Green Ch. 581; *Dev v. John*, 2 Green Ch. 454; *Van Guysling v. Van Kuren*, 35 N. Y. 73; *Jackson Hardin*, 83 Mo. 176; *Hoban v. Piquette*, 52 Mich. 355.) It is not until the reason is invaded, followed by incoherence of ideas and a misapprehension of his relations to his family and society, that the testator can be regarded as insane and unfit to make a valid will.

Although many witnesses were examined on both sides, those for the proponents asserting his sanity, yet many for the contestants speak doubtfully in expressing their opinion, "thought something was wrong," "do not feel competent to judge," and

like expressions, and some others who assert his insanity are without any reason for it, or if a reason is assigned, in many instances it is not satisfactory and shows a lack of knowledge and judgment in such matters. His daughter, Mrs. Cathey, did not think his mind was *very sound* at the time he made his will, and yet the testimony shows when she was applied to for a loan of nine hundred and fifty dollars only the day after the will was executed, and that she refused to make the loan until "she could see 'pap' about it, and if 'pap' said it was safe in loaning that much money on the land I could have it," and required the mortgage to be submitted to him "to see if it was all right." Evidently Mrs. Cathey then thought her father had sufficient capacity to understand business, and preferred his judgment to her own. Another says that about the time he made his will he "was not as sane as before," and the only reason he has for this opinion is, "was his complaining and physical and mental weakness." This witness does not say that he deemed him insane, and the reason amounts to nothing.

Two or three others think his mind was unsound on the subjects of money, politics, and woman suffrage, etc.; that the enfranchisement of women would work the downfall of the republic. One says: "At times he appeared sane enough and at other times he did not," and his reasons were "a controversy about the newspaper dispatches." This witness and the testator were of opposite political faith, and disagreed as to the correctness of the Oregonian dispatches in the campaign of 1884. Now here is the reason which he gives that first caused him to think that the testator was "mentally wrong." "I told him the Oregonian would not publish anything detrimental to the cause it advocated, and he asserted that a public journal that took the associated press dispatches had to publish them."

The value of such a reason for such a purpose is not only worthless but undeserving of comment. We have not the space to review the evidence, but the truth is, the witnesses, with few exceptions, who undertake to impeach his mental soundness, do not claim to have observed it, much less to have formed any opinion in respect to it until the condition of the will began to

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be discussed, and after this proceeding was begun to set aside the will. It was the fact that he had not distributed his estate equally among his children, but had given marked preferences to some over others that bred discussion and comment, and men began to remember peculiarities and eccentricities of character, and to recall many things he said and did, which at the time they regarded as undeserving of notice, but that then appeared as *indicia* of mental aberration or unsoundness. But it would hardly be safe to set aside a will on the ground that the testator was not of sound mind because he had not distributed his property according to what might be a witness' notion of a testator's duty in that particular.

We must remember that the law concedes to every man of sound mind the right of saying to whom his property shall pass by last will. Here is the case of an old man feeble in health and perhaps wasting away with old age, who by his energy and thrift, his frugality and business sagacity, had acquired a large fortune, and all admit retained mental stamina, judgment, and capacity enough to take care of it, and yet because in distributing it among his children he has made preferences in favor of those whom he thought would take best care of it, and not squander the hard earned and harder saved fruits of his toil, his will is attacked, his life ransacked and exposed, and we are asked to declare him insane and his will void. Chancellor Kent said: "It is one of the painful consequences of extreme old age, that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due to his infirmities." (*Van Alst v. Hunter, supra.*) But independent of these considerations, there are facts disclosed by the record which show that he did do business about this time with sense and judgment, which is better proof of his capacity to understand and comprehend such transactions than the mere opinion of witnesses, not founded on any actual business affair; that he was incapable of transacting business, and hence could not have made the will in dispute. It was during this period

that he sold and assigned three mortgages, sold a large tract of land, made deeds, bought a piece of land for one of his sons, wrote numerous letters on business topics and other subjects which are full of good sense and judgment, and utterly refute the imputations of mental unsoundness; paid some bills, deposited five thousand dollars with Mr. Walker, taking his receipt therefor, canceled the Harpole mortgage and took a new one, and made numerous entries in his memorandum book.

4 No one pretends there was any lack of judgment or capacity displayed in transacting these important business matters, or that he did not understand and know what he was doing. Why then was he incapable of making his will? Take his letters to his attorney, written only a short time before the will in controversy was made, and when it is asserted that he was unable to transact business, and the questions he propounds necessarily imply the power to reason and a knowledge of the subject suggested, so far at least as it concerns his own business affairs. He writes Mr. Willis: "If a man has a married daughter, and she has no children, and you was to deed to her and her body heirs, and she was to die without having children, having a husband, who would fall heir to that land, her brothers and her sisters, or her husband?" and then asks: "Does the word 'body heirs' include brothers and sisters and exclude husband?" requests his attorney to furnish him appropriate words to exclude the husband as heir of his wife. These are not the suggestions of a mind groping in mental darkness, but pertinent inquiries to the business he then had in contemplation. His daughter, Mrs. Cathey, was childless and he desired to deed land to her in such a manner as to exclude her husband.

There are several other letters to his attorney in respect to judgments, foreclosure suits, service, questions as to road tax, etc., all of which state the point of inquiry clearly and concisely, and show how well he understood, and what vigilant attention he gave to his business affairs. There are also several written to his son; one just before and another shortly after the execution of the will. In the one he gives him a copy of a form for an assignment of a note and mortgage, and then proceeds to

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advise him in respect to the matter, that the lawyer and the business man would both at once pronounce true and judicious, and then says: "Now let me in conclusion give you what I know from long experience to be good advice in business transactions, to wit., be very careful to have all your papers fixed up right, and don't depend on Dick and Tom's word too much, for everybody is willing to take and nobody is willing to give, and be sure not to take mortgages too near the value of the property, for, as a general rule, when you have to sell under execution the property will only bring about one half of what it is rated at when the mortgage is given." In the other he had bought a piece of land for his son, and says: "I got the whole square west of the Bob Clark claim and paid \$200. I sent to Ware and got him to see if the title was clear, and to tell me how much land there was in a certain boundary. That little plat that I sent to him by Bob to fill out I will enclose in this, so that you can see exactly the land I bought for you. There is, you will see, 52.84 acres. When I was making the trade with Whiteset I supposed there was about 30 acres. He got it at 40 acres, but I was to have all in the plat, now you will see says 52.84, so as to make no jogs in that part of your land. . . . I paid for recording it. I have charged you in my book \$201—\$1 for recording. I think it is a good bargain for this reason, the three corner pieces is good land and suits your other lands."

We have not the space for further quotations, but these are sufficient to show how he thought and wrote and acted just before and after the execution of the will, and to strongly corroborate the testimony of Ware as to his sanity when the will was written, and to show why the subscribing witnesses saw nothing "unusual," and thought his mind was "sound," and that "he appeared to understand what he was doing" when they assembled at his house for the purpose of attesting his will. There is no doubt that the testator was in feeble health, and slowly passing out of life into the grave, but despite bodily ills and pains, the evidence shows, although his mind was less vigorous, that enough of that strong inherited common sense and resolute will remained to understand the nature of the act

Points decided.

and its effects, the property he had, to whom he intended it should pass. Without regard to the evidence for the proponents, the evidence of the contestants taken as a whole does not show more than a case of an old man, feeble in health and suffering occasionally from bodily ills, growing peevish and querulous, and exhibiting at times mental weakness, but which does not show insanity or incapacity to know and understand, and appreciate what he was doing, whether of business or otherwise. Nor are the reasons assigned for the opinions entertained always worthy to be taken into account.

As a result it is our opinion that the testator was of sound mind when he executed the will in controversy, and that it was the product of his own free agency. And in conclusion we may say that while it has been our duty to criticise some of the testimony, we would not have it inferred that we do not recognize in them good, reputable citizens, testifying to what they believed to be true, and as they understood and reasoned upon the facts.

On the question of undue influence we do not think there is any evidence to sustain the issue, nor was much attention given to it at the argument. And finally, in view of some facts and circumstances to which it is not necessary to refer, the costs and disbursements must be paid by the estate, of this court and the lower courts, and the decree of the Circuit Court in all other things affirmed, and it is so ordered.

[Filed March 19, 1888.]

JOSEPH HOLLADAY, APPELLANT, v. ESTHER HOLLADAY, RESPONDENT.

16	147
18	109
20	463
19*	81
22*	750
26*	562

AN EXECUTOR is a person to whom the decedent has confided the execution of his last will, and he derives his appointment from it. Letters testamentary issued by the probate judge are but the authentic evidences of the power conferred by the will, and are founded upon the probate of that instrument.

EXECUTOR, ELIGIBILITY OF. — At common law, all persons capable of making wills, and some others besides, are capable of being made executors, and from the earliest time, it has been the rule that every person may be an executor, saving such as are expressly forbidden. Our Code has disqualified many persons, who, at common law, were competent to serve as executors, the tendency of modern

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legislation being to enlarge the control of Probate Courts in respect to testamentary appointments; but the principle by which the court is to be guided in determining to whom letters testamentary are to be issued remains unchanged.

WILLS—LETTERS TESTAMENTARY.—As at common law, so under the statute, all persons not expressly forbidden may serve as executors, and when one or more are so appointed by the testator, the court must give heed to his choice, and issue the necessary letters to enable such representative to perform his trust. It was therefore *held*, that when a will is proven, it is the plain duty of the court to grant letters testamentary to the person named in the will, upon his application, who is not disqualified by the statute.

APPEAL from Multnomah County.

R. & E. B. Williams, for Appellant.

McDougall & Tanner, for Respondent.

LORD, C. J.—This is styled a protest to the appointment of the plaintiff as executor of the last will and testament of Ben Holladay, deceased. On the eighth day of July, 1887, Ben Holladay died at Portland, Oregon, leaving a will dated September 5, 1875, in which the plaintiff was named as one of the executors. As to the other executors named, one being dead and the other a non-resident, the plaintiff was the only executor entitled to apply for letters to administer the estate in pursuance of the will. After the will was admitted to probate, this protest or proceeding was brought to prevent the issuing of letters testamentary to the plaintiff, and as it affirmatively appeared that none of the objections raised come within section 1108 of the Code, the court ruled adversely to the defendant, and upon appeal to the Circuit Court this decision was reversed. From the said judgment of the Circuit Court the plaintiff brings this appeal. The only question to be determined is as to the qualifications of Joseph Holladay to act as such executor.

Section 1084 of Hill's Code provides as follows: "When a will is proven, letters testamentary shall be issued to the persons named therein as executors, or to such of them as give notice of their trust and are qualified," etc.; and section 1108 prescribes that "the following persons are not qualified to act as executors or administrators, non-residents of this State, minors, judicial officers, other than justices of the peace, persons of unsound mind, or who has been convicted of any felony, or of a misde-

meanor involving moral turpitude, or a married woman.” The first section indicates that it was the legislative intention to respect the choice of the testator in the appointment of an executor to carry into effect his last will, and that the two sections considered *in pari materia* authorize the appointment of any and all persons as executors, except such as are expressly disqualified or forbidden by the last section cited.

As the contention of counsel for the defendant controverts this construction, and insists that the court is invested with a large discretionary power, in the exercise of which it may refuse letters testamentary to an executor, although not liable to any statutory disqualification, who, for any reason in the judgment of the court may be unfit or unsuitable for the performance of the trust, it is well to note what the common law was before the existence of these statutory provisions in order to ascertain the extent of the change effected by them.

An executor is a person to whom the deceased has confided the execution of his last will. He derives his appointment from the will, and upon it his authority is grounded. The letters issued to him by the probate judge “are but the authentic evidences of the power conferred by the will, and are founded upon the probate of that instrument.” (*Hartnell v. Wandall*, 60 N. Y. 350.) Although he may not act, except in a few particulars, until the will is probated and letters testamentary issued, yet this fact does not affect the efficiency of the will as the source of power.

When not contrary to law, the right to make a will and to appoint the person to carry it into effect has long been esteemed an invaluable right, and one not to be disregarded. At common law, such was the respect in which the wishes of the testator was held in the appointment of an executor to stand in his place and settle his estate, that the principle was sometimes carried to the extent of appointing persons obviously unsuitable to exercise the trust. (*Schouler on Executors and Administrators*, § 33.) Unless specially disqualified, all persons may be made executors, and few or none are disabled or incapacitated to act as such on account of their crimes.

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"Generally speaking," says Mr. Williams, "all persons capable of making wills, and some others besides, are capable of being made executors, and that from the earliest times it has been a rule that every person may be an executor, saving such as are expressly forbidden." (Williams on Executors, 268.) Hence immorality or habitual drunkenness did not disqualify, nor those attainted or outlawed for political offenses, or convicted of crime; and that "the spiritual court cannot refuse to grant the probate of a will to a person appointed executor on account of his poverty or insolvency." (Williams on Executors, 295; Redfield on Wills, 69, et seq.; Schouler on Executors and Administrators, § 33, et seq.) So that in the absence of statute, we find that aliens, minors, married women, criminals, immoral persons, habitual drunkards, insolvents, and other obviously unsuitable persons were not disqualified by the English law, and that the rule was, as already stated, that all persons may serve as executors, except such as are expressly forbidden.

In *Berry v. Hamilton*, 12 Mon. B. 191, the court say: "An executor derives his office from testamentary appointment; and if he be a man, not prohibited by law from being an executor, the County Courts have no rights to refuse his qualification;" and again, "it is sufficient for us to say that the law has declared who may and who may not be an executor, and if Berry be a man whom the law allows to be appointed as such, it follows that upon his motion to give bond and qualify under the will, it was the duty of the County Court, if the security was sufficient to permit him to give bonds and be qualified as executor, and to grant to him letters testamentary."

The common law forbids the appointment of an idiot, or lunatic, or insane person, for these disabilities not only render them incapable of performing the duties of such a trust, but their want of understanding likewise rendered them incapable of determining whether or not they would accept the trust. These references are sufficient to show how few are disqualified to act as executor at common law, and how strictly the wishes of the testator were regarded and enforced in his appointment of a representative to manage and control his estate after death.

In fact, there seems to have been no discretion left to the court in the matter; if the person named as executor did not come within the inhibited class, the court had no right to refuse his application. Now the change effected by the provisions of our Code already referred to is that very many persons who, at common law, were competent to serve as executors have been expressly disqualified, so that the prohibited class is quite materially increased, and the power of the court in respect thereto proportionally enlarged for the purpose of enforcing their exclusion. The tendency of modern legislation has been to enlarge the control of probate courts in respect to testamentary appointments. In some of the States, notably New York, California, Massachusetts, and Wisconsin, the disqualifications of an executor are prescribed with great minuteness, and include drunkenness, dishonesty, improvidence, and other causes of unsuitableness. But the principle by which the court is to be guided in determining to whom letters testamentary are to be issued remains unchanged. As at common law, so under the statute, all persons not expressly forbidden may serve as executors, and when one or more are so appointed by the testator, the court must give heed to his choice, and issue the necessary letters to enable his representative to perform his trust.

When a will is proven, its plain duty is to grant letters to the person named in the will, upon his application, who is not disqualified by the statute. All persons are qualified and competent to serve who are not disqualified, and when nominated in the will entitled to have the letters testamentary issued to them. This is not only the plain construction of the provisions cited, but it comports with the rule that prevailed at common law to respect the wishes of the testator, and to grant letters to those named competent to serve as executor. It is admitted that the plaintiff is not disqualified, or does not fall within one or the other of the exceptions of the statute. He must then be qualified and entitled to the letters, and if so, what right has the court to deny his application, overturn the choice of the testator, and disappoint his wishes. In such case, the point at issue is the qualification of the person named as executor, and the court

must look to the law as the source of its power, and yield obedience to it.

Said Johnson, J.: "The statute makes it the duty of the surrogate, when any will or personal estate shall have been admitted to probate, to issue letters testamentary thereon to the persons named therein as executors, if they are by law competent to serve as such. It then provides who shall be deemed incompetent to serve as an executor. I am of the opinion that any person appointed or named as an executor in a will is to be deemed competent, unless he is declared incompetent by the statute; and that it is the duty of the surrogate to grant letters to every person named as executor in a will upon his application, who is not declared incompetent to serve by statute. He has no discretion to exercise in the matter, but must obey the requirements of the statute, which is the sole source of his power. To allow surrogates to invent new causes of disqualification, and to add to those prescribed by statute, would be conferring worse and dangerous powers upon these officers of special and limited jurisdiction. *But in any view of the case, the respondent was clearly competent to serve as executor, and having applied for letters in pursuance of his appointment by the will, the surrogate has no right to refuse them.*" (*McGregor v. McGregor*, 33 How. Pr. 456; Willard on Executors and Surrogates, 134.)

It may be true, that the power to remove an executor for failing to perform his duties, or other sufficient cause, in the absence of statute regulation, inheres in the court, or that the court in such case is not always confined strictly to the cases enumerated in the statutes, when the exercise of such power is essential to prevent a failure of justice, and may be regarded as incidental to the office or court. What may be the extent of judicial discretion in such cases, or whether the court is confined entirely to the powers specially granted, and cannot remove an executor for any other cause than those prescribed by the statute, is not before us, nor do we decide. What we hold is, that the plaintiff being the person named in the will as executor, and qualified to serve, it was the duty of the court, upon his application, to grant him letters testamentary.

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The judgment of the Circuit Court must be reversed, and the cause remanded for such further proceedings, as may be proper in accordance with this opinion.

[Filed March 19, 1888.]

F. P. HEMBREE ET AL., RESPONDENTS, v. BLACKBURN AND PECKHAM, AND I. R. DAWSON, APPELLANTS.

16 153
34 90

CHATTEL MORTGAGE DEFINED.—A chattel mortgage is the conditional sale of a chattel, to be void upon the performance of the condition named therein.

PARTNER—POWER TO MORTGAGE CHATTELS OF THE FIRM TO SECURE PARTNERSHIP DEBTS.—One member of a firm has the authority to mortgage the chattels of the partnership to secure the payment of partnership debts, without the knowledge or consent of the other members of such firm.

APPEAL from Yamhill County.

Cox, Smith & Teal, for Appellants.

McCain & Hurley, for Respondents.

STRAHAN, J.—Blackburn and Peckham were partners in the business of merchandising at Carlton, in Yamhill County, Oregon. In the course of their business they became indebted to a number of merchants in Portland in the aggregate amount of about \$7,941.22, to secure which sum of money to I. R. Dawson, to whom such claims had been assigned, A. Blackburn, as one member of said firm, and in behalf of the firm, executed to said Dawson a note, and also a mortgage to secure the same on all of the firm's property. Said firm was also indebted to the plaintiffs and others, who caused the firm's property to be attached after the making of said chattel mortgage, and after Dawson had entered into the possession of said property under the mortgage, and they then brought this suit to set aside and cancel said mortgage as fraudulent. The plaintiffs obtained a decree in the court below, setting aside said mortgage, from which the appellant Dawson has brought this appeal. The cause was referred in the court below and the evidence taken in

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writing, so that the entire case is here both on the law and facts.

1. The main contention of the plaintiffs is that the writing which is sought to be set aside by this suit is an assignment for the benefit of creditors, and that one partner without the consent of the other has no power to make such an assignment. Said writing is as follows:—

“EXHIBIT ‘A.’

“This indenture, made the sixth day of November, in the year of our Lord one thousand eight hundred and eighty-six, between A. Blackburn and E. L. Peckham, partners as Blackburn and Peckham, of Carlton, county of Yamhill, State of Oregon, the parties of the first part, and I. R. Dawson, of Portland, county of Multnomah, State of Oregon, the party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of seven thousand nine hundred and forty-one and twenty-two one hundredths dollars gold coin of the United States, to us in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part, all those certain goods and chattels now being in the town of Carlton, county of Yamhill, Oregon, and in Yamhill County, State of Oregon, and described as follows, to wit: All our stock of goods, wares, and merchandise now in our store-house and warehouse in said town of Carlton. All our horses, wagons, and other personal property heretofore mortgaged to Murphy, Grant & Co., by mortgage dated November 1, 1886, and filed in the office of the clerk of the said county on that date, together with all personal property of every kind and nature belonging to said firm of Blackburn and Peckham. To have and to hold all and singular the said goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, his executors, administrators, and assigns forever. *Provided*, nevertheless, and these presents are upon this express condition, that if the said parties

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of the first part, their executors, administrators, or assigns shall well and truly pay unto the party of the second part, his executors, administrators, or assigns, the sum of seven thousand nine hundred and forty-one and twenty-two one hundredths dollars, and interest thereon at the rate of ten per cent per annum, in accordance with the terms of a certain promissory note, of which the following is substantially a copy:—

“\$7,941.22.

“PORTLAND, OREGON, 6th November, 1886.

“On demand after date, without grace, I promise to pay to the order of Ivan R. Dawson, at his office in Portland, Oregon, seven thousand nine hundred and forty-one and twenty-two one hundredths dollars, for value received, with interest after date at the rate of ten per cent per annum until paid, principal and interest payable in United States gold coin, and in case suit is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorneys’ fees in said suit.

(Signed,)

“BLACKBURN AND PECKHAM.

“A. BLACKBURN.”

“Then these presents shall be void.

“The party of the second part shall take immediate possession of said property, and possession is hereby delivered to him, and he shall sell and dispose of the property herein named, at private sale, at such price and in such manner as he shall deem best, and after deducting the costs and expenses of such sale, shall apply the proceeds of the same to the payment of the aforesaid note, and if there shall be any balance remaining after the payment of said note, shall pay over the same to said Blackburn and Peckham.

“In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed,)

“BLACKBURN AND PECKHAM.

“A. BLACKBURN.

“Signed, sealed, and delivered, in presence of MILTON W. SMITH.”

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"EXHIBIT 'B'."

"For value received we hereby assign, sell, set over, and transfer all our books, accounts, notes, and other demands to I. R. Dawson.

"Witness our hands this 6th November, 1886.

(Signed,)

"BLACKBURN AND PECKHAM.

"A. BLACKBURN.

'Witness: MILTON W. SMITH.'

This writing on its face contains every requisite necessary to constitute a chattel mortgage. It is to secure the payment of money, and it is made directly to the creditor. It purports to be a conditional sale of the property as security for the payment of a debt. The condition is that the conveyance is to be void upon the performance of the condition named, which in this instance is the payment of the money. (Jones on Chattel Mortgages, § 1; Herman on Chattel Mortgages, § 15.) And in defining the distinction between a chattel mortgage and an assignment, Bishop on Insurance Debtors, section 105, says: "... The distinction, however, is one clearly defined. A mortgage or deed of trust in the nature of a mortgage is a security for a debt. An assignment is more than that; it is an absolute appropriation of property to the payment of debts. (*Murray v. Judson*, 9 N. Y. 73, 83; 59 Am. Dec. 516; Gardner, J., *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637.) A mortgage creates a lien upon property in favor of the creditor, leaving the equity of redemption still the property of the debtor and liable to sale or encumbrance by him." (*Leitch v. Hollister*, 4 N. Y. 211; *Dunham v. Whitehead*, 21 N. Y. 131; *McClelland v. Remsen*, 3 Abb. N. Y. App. 74; *Van Buskirk v. Warren*, 4 Abb. N. Y. App. 457; *Loeschick v. Baldwin*, 1 Rob. [N. Y.] 377.)

The fact that Blackburn and Peckham at the date of the writing were justly indebted to sundry creditors in Portland to the full amount specified, and that such creditors had, for the purposes of collection, assigned their several claims to I. R. Dawson, and that the sum specified in such writing is the aggre-

gate of such claims, was in no way controverted upon the trial; and the respondents rest their entire claim in this court on the character of the instrument, and the want of power in one partner to execute the same without the consent of the other. Nor was there any evidence offered tending in any way to prove that such writing was anything different from what it purports to be upon its face.

2. Having reached the conclusion that the instrument in question is a mortgage and not an assignment, it remains to be considered whether one partner can, without the consent of the other, execute a chattel mortgage covering the entire partnership property to secure the payment of partnership debts. It must be conceded that each partner is the general agent of the firm in the transaction of the business of the partnership. He may dispose of any or all of the property of the firm in the regular course of business, and apply the proceeds in the payment of the firm's debts, or he may deliver the property directly to the creditor in satisfaction of the firm's debts. Such being the power of a partner over the business of the firm, no reason is perceived why one member of the partnership may not pledge or mortgage the partnership property to secure the firm's debts. Cases will readily suggest themselves where it would be greatly to the interest of an embarrassed partnership to mortgage its property as security rather than be driven out of business by bankruptcy. And such seems to be the general current of authority.

In *McClelland v. Remsen*, 36 Barb. 622, the principle is thus stated: "But the authority of one copartner to sell the copartnership property to a particular creditor or creditors in payment of their debts has been judicially determined and is now the settled law. The power of a partner to dispose of the property of the firm extends to assignments of it as security for antecedent debts as well as for debts to be thereafter contracted on account of the firm." And this case was affirmed by the court of appeals. *McClelland v. Remsen*, 3 Abb. N. Y. App. 74, and *Mabbett v. White*, 12 N. Y. 442, is to the same effect. And the same principle is announced in *Patch v. Wheatland*, 8 Allen, 102; *Nelson v. Wheelock*, 46 Ill. 25; *Graser v. Stelhwagen*, 25 N. Y. 315;

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Tapley v. Butterfield, 1 Met. 515; *Sweetzer v. Mead*, 5 Mich. 107; *Deekard v. Case*, 5 Watts, 22; 30 Am. Dec. 287; *Fromme v. Jones*, 13 Iowa, 474; *Gates v. Bennett*, 33 Ark. 475; Jones on Chattel Mortgages, § 46; Herman on Chattel Mortgages, § 118; *Garrett v. Burlington Plow Co.* 70 Iowa, 697; 59 Am. Rep. 461. In the case under consideration no fraud is alleged. All the parties to the transaction acted in good faith. The defendant Dawson did no act violative of the rights of the plaintiffs. The mortgage gave him a preference, but this was a lawful preference, and one which he had a right to take. The effect of it no doubt was to impair the ability of Blackburn and Peckham to pay the plaintiffs, but this is the effect of all preferences where the debtor is in failing circumstances; but this does not render such preference unlawful unless expressly declared to be so by some statute.

The decree of the court below must therefore be reversed and the suit dismissed.

Petition for a rehearing.

THAYER, J.—It was claimed upon the hearing of this case, that the instrument signed by Blackburn, in the name of Blackburn and Peckham, by which their copartnership property was attempted to be transferred to Dawson, constituted a general assignment for the benefit of creditors; that it was not within the regular course of the partnership business, and as Peckham was not present when it was executed, and did not assent thereto, it was void. After a very thorough consideration of the matter, we came to the conclusion that the said instrument was only a chattel mortgage, and as it was given to secure the payment of a *bona fide* indebtedness the said firm was under to Dawson, and those he represented, it was valid. Counsel for the respondents upon a rehearing of the case have pressed upon the attention of the court the question, whether the instrument is such assignment or is a mortgage, is not material, as it was executed against the open protest and opposition of the partner Peckham, and is therefore void. Whether the instrument was executed against the protest and opposition

of Peckham is a question of fact, upon which the counsel for the respective parties disagree; nor is the testimony which bears upon it at all conclusive.

There is evidence in the case which tends to prove that Peckham was not in favor of securing the Portland creditors, without securing the farmers for the wheat they had stored with the firm, which had been shipped and sold and unaccounted for. This seems to have been the only ground of opposition to the mortgage. Peckham did not pretend, nor did respondents' counsel claim, but that the Portland creditors were entitled to have their debts secured. The parties all acknowledge that it was a just indebtedness. Peckham was evidently willing to secure it, but through a sense of right, or an apprehension that he might be charged with the embezzlement of the wheat, insisted upon the security extending to both sets of claims. What the relative merits of the two may be is not necessary to inquire, as the question raised by the counsel goes to the power of a partner to give such a mortgage in any case against the express wishes of his copartner. I do not think a partner would have any right to mortgage the partnership effects to secure a liability not arising out of the partnership transactions, against the dissent of his copartner, such as the liabilities of the individual partner executing the mortgage. But to mortgage the property of the copartnership in good faith, to secure a valid existing indebtedness against the firm, presents a different question.

In the latter case, it seems to me, that it would not matter whether the other partner assented or dissented. The creditor would have an undoubted right to seize and sequester the property in order to obtain a satisfaction of his demands, and I cannot understand why one of the partners would not have the right to turn it over to him as a security therefor, if the other did object to his doing so. "By the act of entering into the copartnership," as was said in *Wilkins v. Pearce*, 5 Denio, 544, "each of its members became clothed with full power to make any and every contract within the scope and limits of the copartnership business. All such contracts will therefore be absolutely binding upon the several members. This power is

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incident to the copartnership relation, and must exist in defiance of expostulations and objections while the relation endures.”

If the act of the partner were of such a character that it would have the effect to dissolve the copartnership, or if it related to a matter outside of the copartnership business, I should regard the question in a different light. Then each of the partners would be entitled to be consulted in regard to it, and have the right to object to its being done; but I am not able to conclude that a partner, after having tacitly agreed that the other members of the firm shall have authority to represent it in all copartnership transactions, may suspend such authority at his own will or caprice, especially where the proposed act consists in carrying out an obligation which the firm is under to a third person.

Such a view does not appear to me to be reasonable. One partner should certainly have the right to pay off a debt due a creditor of the firm from its assets, notwithstanding the remonstrance of the other partner, and I am unable to discover any difference in principle in the two cases. If the authority of a partner to transact business of the firm within the scope of the partnership could be abruptly revoked, the agreement which constitutes the foundation of the relation would be very insecure; it would be, in effect, that each partner should have authority to manage the business of the firm, so long as the other members assented to it. That, however, is not the nature of the agreement; it is that each of them shall be the agent of the partnership, and empowered to conduct its affairs so long as it continues. If the rule were as contended for, an obstinate partner could at any time interpose and prevent the continuance of the business, however much it might affect the credit and reputation of the other members.

A partner would certainly have no standing in a court of justice to demand that a sale or mortgage of the property of the company, made in good faith in payment of, or as security for a *bona fide* debt due from it, should be set aside. And if a partner could not enforce such relief, how could the other creditors of the company be allowed to claim that the sale or mortgage

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was a nullity? If such transactions cannot be upheld, honesty and fair dealing must be declared to be unlawful.

I see no reason for changing the former decision of the court in this case, and am in favor of redeclaring it.

[Filed March 21, 1888.]

W. B. WALKER, APPELLANT, v. LOUIS GOLDSMITH
ET AL., RESPONDENTS.

TAXATION OF DISBURSEMENTS—OBJECTIONS—HOW MADE.—Items claimed as disbursements must be itemized and verified, and objections thereto must be to each item separately, and the reason of such objection must be clearly and distinctly stated.

OBJECTIONS—WHAT NOT CONSIDERED.—No objection to any item claimed as a disbursement can be considered or entertained unless made before the taxing officer in the court below and within the time allowed by law.

CASE IN JUDGMENT.—When the item claimed was this: To the clerk of the Supreme Court for copy of evidence and judgment roll in case of *T. v. D.*, composing exhibit 30, \$259.50, was objected to for the reason that said copy of evidence and judgment roll was procured by the plaintiff for his own use as evidence in said cause, upon an issue of fact tried therein upon which plaintiff was defeated, and upon which final judgment was rendered against him, and in favor of the defendants in said cause. *Held*, that said objections did not present the question sought to be raised on this appeal, namely, that the *copy of evidence* was incompetent upon the trial of this suit, and that the same was not used upon such trial.

APPEAL from Multnomah County.

P. L. Willis, for Appellant.

Williams, Ach & Wood, and *James K. Kelly*, for Respondents.

STRAHAN, J.—This is an appeal from the judgment of the court below, given on appeal from the clerk's taxation of costs and disbursements. The objections filed with the clerk included the only item involved on this appeal, and are as follows: "Object to the following item in said statement: 'To clerk of Supreme Court for copy of *evidence* and judgment roll, in case of *Teal v. Dickenson*, composing exhibit 30, \$259.50,' for the reason that said copy of evidence and judgment roll were pro-

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cured by the plaintiff for his own use, as evidence in said cause, upon an issue of fact tried therein, upon which plaintiff was defeated, and upon which final judgment was rendered against him and in favor of defendants in said cause. None of the said witnesses or copies referred to in the above objections were used by these defendants, or were of any value or use to them in this litigation."

The suit in which this controversy originated was for the purpose of obtaining partition of certain real property, and by the final decree the costs and disbursements in the suit were apportioned to be paid by the several parties according to their respective interests in the land. All disbursements in the cause, therefore, which were properly incurred or made in the cause were taxable under the decree, and to be apportioned among the several parties according to the rule therein defined.

It was conceded upon the argument here that so much of the item objected to as was paid for a certified copy of the judgment roll in this court, in *Teal v. Dickenson*, might properly be allowed; but it was insisted that all of the evidence which accompanied the judgment roll was incompetent in this suit, and could not be, and was not used upon the trial, and therefore no allowance ought to be made for it. If this objection had been taken before the clerk in the court below, I am inclined to think it ought to have prevailed; but it was not. The objections there made were placed on other and different ground, and which were virtually abandoned upon the argument here. Under our system of taxing costs and disbursements, each item claimed as a disbursement must be set down separately in the itemized statement, and the same must be verified.

If objections be made to any one or more of such items, they must be made to each separate item to which exceptions are taken, and they must particularly specify and point out in what respect such claim is wrong, or why it should not be allowed; and no objections not thus made can be considered. If such objections be not made within proper time the disbursements claimed are allowed of course. (*Wilson v. City of Salem*, 3 Or. 483.)

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The objections made in the court below were not sufficiently specific and are untenable, and the objection which is now made in this court for the first time cannot be considered. It follows that the decree of the court below disallowing said item is reversed, and the same is allowed and ordered to be taxed as a disbursement in said cause.

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147	615

[Filed March 28, 1888.]

MARY J. WEBER, RESPONDENT, v. EMIL WEBER,
APPELLANT.

DIVORCE—POWER TO GRANT—STATUTORY.—The power to grant a divorce, and such other relief as is usually incidental thereto, is purely statutory.

DIVORCE—PLEADING—WIFE'S SEPARATE PROPERTY.—In a divorce suit by a wife, her pleading ought to allege what personal property of hers the husband has in his possession or control, to enable the court to make a decree in her favor therefor.

DIVORCE SUIT—PLEADING IN.—In a divorce suit by the wife, when she alleges that certain personal property is the property of her husband, a decree finding the same is her separate property will be reversed as unauthorized and contrary to the pleadings.

APPEAL from Multnomah County.

Watson, Hume & Watson, for Appellant.

Cornelius Taylor, and *H. T. Bingham*, for Respondent.

STRAHAN, J.—At the last term of this court, another part of the decree in this case was here for review on Rothchild's appeal, and the opinion of the court thereon is reported in 15 Or. 385. Since that time the defendant Weber has perfected an appeal from so much of the same decree as adjudges that the plaintiff is the owner of the household furniture described in the amended complaint, and in the findings of the court, and from the further order and decree made in said cause on the twenty-fourth day of September, 1887, wherein and whereby it was ordered and decreed that the furniture in the dwelling-house situated on lot 8, in block 45, in Couch's Addi-

tion to the city of Portland, Oregon, being the house where the plaintiff now resides, is the separate property of the plaintiff.

The complaint, as well as the amended complaint, alleges that the property involved in this appeal is the property of appellant. This allegation is denied in the answer by appellant, and said property is alleged to be the property of his co-defendant Rothchild. The only question presented by the appeal is whether or not the court could, under the pleadings, divest the title out of the appellant or his co-defendant Rothchild, and by the decree invest it in the plaintiff.

1. It was conceded upon the argument by both parties that the power to grant a divorce, and such other relief as is usually incident thereto, is purely statutory. (1 Pomeroy's Equity Juris. §§ 98, 112, 171; 1 Bishop on Marriage and Divorce, § 71.) Section 501 of Hill's Code defines the power of the court in case a marriage is declared void or dissolved. It says:—

"Sec. 501. Whenever a marriage shall be declared void or dissolved, the court shall have power to further decree as follows: ". . . (2) For the recovery of the party in fault, and not allowed the care and custody of such children, such an amount of money in gross or in installments, as may be just and proper for such party to contribute towards the nurture and education thereof. (3) For the recovery of the party in fault, such an amount of money, in gross or in installments, as may be just and proper for such party to contribute to the maintenance of the other. (4) For the delivery to the wife, when she is not the party in fault, of her personal property in possession or control of the husband at the time of giving the decree. . . ."

An insuperable objection to this part of the decree is that it is not alleged in the complaint that the property in controversy was the property of the plaintiff, or that the same was in the possession or control of the husband; on the contrary, it is alleged that this property is the property of the defendant Weber, and that it is in the possession of the plaintiff. If the appellant owned the property, as the plaintiff alleged, the court had no power by its decree to divest his title and give it to the plaintiff; on the other hand, if the same was the separate prop-

Points decided.

erty of the plaintiff, she failed to bring her case within the statute entitling her to any relief as to this property, but precluded herself by her own allegations from setting up title to the same. So that in neither view of the subject can this part of the decree be sustained.

2. A decree must be based upon and in accordance with the facts alleged in the pleadings. It cannot be upon a state of facts, the exact opposite of what is alleged. This subject was under consideration in *Bender v. Bender*, 14 Or. 353, and it is unnecessary to repeat what was there said. If the plaintiff is in fact the owner of this property, other provisions of the statute afford her an adequate remedy for its recovery should she be deprived of it.

Let so much of the decree appealed from as is specified in the notice of appeal be reversed; but the appellant must pay the costs of this appeal, for the reason that so far as appears, the entire litigation grew out of his misconduct, and the plaintiff is in every respect free from all fault.

[Filed April 4, 1888.]

**JOSIAH WEST, APPELLANT, v. E. A. TAYLOR AND
JAMES TAYLOR, RESPONDENTS.**

WATER-COURSE — RIGHTS OF CONTERMINOUS PROPRIETORS AS TO SURFACE WATER NOT DECIDED. — The authorities on the subject are not harmonious, and the facts not rendering it necessary, the question not determined.

SURFACE WATER — WHAT NOT. — The water flowing out of Cullaby Lake and seeking an outlet by the Skipanon is not *surface water*.

WATER-COURSE — WHAT IS — DOES NOT CEASE TO BE, BY SPREADING. — A stream does not cease to be a water-course and become *mere surface water* because at certain points it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel.

APPEAL from Clatsop County.

J. Q. A. Bowlby, R. Stott, and J. B. Waldo, for Appellant.

Fullon Brothers, for Respondents.

16	165
21	41
13*	865
27*	9

16	165
37	280

16	165
40	589

16	165
e47	358

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STRAHAN, J. — The object of this suit is to restrain the defendants from maintaining or repairing a certain dike or dam erected by them on their own lands in Clatsop County, Oregon, whereby the waters accumulating and flowing out of Cullaby Lake are caused to flow back upon the plaintiff's lands, by means of which their use for agriculture or pasturage is entirely destroyed.

The facts as they appear from the evidence are about as follows: The plaintiff owns a large body of land adjacent to Cullaby Lake, in Clatsop County, Oregon. This lake is about two miles long and upon an average about one half mile wide, and is fed by perennial springs and a mountain stream five or six miles long, which flows into the lake at its southern extremity, and is called Clatsop Creek; for two miles south of the lake it is a deep, sluggish creek, and is of the depth of from nine to ten feet. Prior to 1877, the main outlet to the lake was Neacoxie Creek, into which the waters of said lake flowed at ordinary stages. From the western part of the lake, Neacoxie Creek flowed in a northwest course for about four miles; it then curved sharply to the westward, and from thence in a southerly direction along the coast; many miles south of the source of the lake it empties into Okauna Creek which flows into the Pacific Ocean. About the year 1877, the sand drifted into Neacoxie Creek in such quantities that its channel became choked up and it entirely ceased to be an outlet for the waters of said lake. This result was produced solely by natural causes. During high water at all times Neacoxie Creek was insufficient as an outlet for the constantly accumulating waters of said lake, but after it became filled and choked with sand, the waters of said lake have flowed out at the northern portion thereof, a part of which spread out over the lands of the defendant and others lying north of said lake, while the greater portion thereof finally gained an outlet into Skipanon Creek which empties into Young's Bay. There is no well defined water-way from Cullaby Lake to Skipanon Creek extending over the entire distance, but over the greater portion thereof there extend "swales, marshes, depressions, or hollows," into which the water flows during the greater part of the year, with a continuous current northward to

the Skipanon. The inclination of the surface from Cullaby Lake to the Skipanon is not great, but is enough to carry the water if left unobstructed from one point to the other. For the purpose of restraining the waters of Cullaby Lake from spreading over the defendants' land the dike in question was constructed. It is two feet eight and one half inches high, and its erection has raised the waters above and south of it high enough to overflow from three to four hundred acres of the plaintiff's land, and about one thousand acres in all, which were not previously covered by water. Before the erection of said dike, the defendants and others, for the purpose of reclaiming their lands, had dug two ditches from Skipanon Creek, extending up to or near the north end of the lake, so that a large portion of the overflow of the lake was carried off by means of these ditches.

A well informed witness describes the situation thus:—

“Int. 4, p. 5. How many natural outlets are there from that lake?

“Ans. I should say for quite a number of years back the only natural outlet or inlet at all that I know of has been through the marsh. By the marsh I mean what is marked Ex. A, as marsh between Cullaby Lake and Skipanon Creek; the water escapes over and through the marsh; the ground appears to be porous and in some places appears to be floating and allows the water to flow partially under the marsh; joining the main-land the water seems to be deeper than in any other part of the marsh, that is on the west side of the marsh; in former times there seems to have been another partial outlet; since about the year 1877, this has been the only outlet that I know of; I don't know what was the outlet before 1877; don't think I ever was in the marsh prior to 1877; have seen the marsh several times lately; there is a dike or dam on the south line of the James Taylor claim or close to the line.

“Int. 5, p. 6. State what effect, if any, was had upon the land?

“A. As long as the dam held it forced the water back upon the lake and adjacent marshes; it overflowed the land of plaintiff.

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iff partially; it is a damage to plaintiff's land, but how much I cannot say; the overflow of these lands interfered with the use of them.

"A. to Int. 2, p. 19. At the present time there is what is called the little ditch, between which and the slough which I speak of is high or marsh land, of perhaps a rod in width or more; what I mean by the slough is clearer water than the rest of the marsh, the rest of the marsh having brush and grass growing upon it; it is, I should judge, about a rod in width; it is too deep to wade; soft bottom; it has a slight current to the north."

"Cross-question, p. 20. Is it not in many places entirely grown up with brush and crab-apples?

"Ans. Not so but I could get through with a boat.

"Int. 22, p. 22. What did you ever go along the west side of the marsh on defendants' land in a boat through this slough you speak of for?

"A. I had shot a duck in it and I got Carnham's boat and got it. I was through there two years ago.

"Int. 13. How far through defendants' land did you go in what you call a slough in a boat?

"A. About half way through."

Another witness, R. W. Morrison, amongst other things testified as follows:—

"Ans. to Int. 1, p. 31. The marsh running across the east portion of my claim is as follows: Through my lands there are two branches of marsh. Between these branches there is a ridge of land. The marshes are branches of the portion of the marsh that is south and joins Cullaby Lake. There is a good deal of water going down these marshes at present, but most of it is going through ditches that have been cut through the marshes. By down I mean north, coming from Cullaby Lake and flowing in a northerly direction.

"Int. 2. How long ago were these ditches dug?

"A. The one in the west arm must have been dug some six or eight years ago. The one in the east, dug some years later.

"Int. 3, p. 32. What was the condition of these arms before the ditches were dug?

"A. In the winter time they were flooded. In the summer time, years ago, they were dry, that is, there was no running water or standing water except in low places. On my place I did not think there was any water that stood all summer except on the east marsh. There was a small channel that sometimes was above ground, and sometimes you would not see it for running under the trees. It would run under ground for a rod or two occasionally, and then appear on the surface again. This little channel stands in near the south line of my claim.

"Int. 4, p. 33. In what direction did the water in any of those marshes run prior to the digging of those ditches?

"A. The same course as in the ditches. The east marsh empties into Skipanon and the west marsh into the Skipanon.

"Int. 7, p. 34. For how many years has the water run down the arms of that marsh during the winter season?

"A. As many years as I have lived there."

Mr. Philip Condit, also another witness, thus describes the condition of the water between Cullaby Lake and Skipanon Creek:—

"Int. 2. Are you acquainted with Cullaby Lake?

"Ans. Yes sir; have been acquainted with it pretty well for fifteen years; am acquainted with the lands and waters between it and the Skipanon; along through the marsh in 1874 the water was running through them some; this was in the winter season; late in November there seemed to be considerable water running through; the water was running across Mr. Morrison's, the Hobson place, and the Taylor place; all the water was running north towards the Skipanon; there seemed to be a small channel most of the way; but after you get up to the Carnham marsh there did not seem to be any well defined channel; the water spread over the marsh; this cranberry marsh is on the Hobson place and on the Taylor place; sometime I would go clear through to Cullaby Lake.

"Int. 3. Which was the water coming from?

"A. From Cullaby Lake.

"Int. 5. Where did the water come from?

"A. It came from Cullaby Lake."

The general inclination of the earth's surface from the north end of Cullaby Lake to the Skipanon is slightly downward, so that the water flowing out of said lake at the north end would naturally flow into Skipanon Creek, so that for more than twenty-five years, in cases of freshets, the water escaping from this part of the lake has found an outlet through Skipanon Creek. It also appears from the evidence given by A. G. Wirt that as early as 1852, the waters of the lake were accustomed to overflow at the north end thereof, and run down through the marsh across Taylor and Hobson's claims to Skipanon, and that the water from the lake then flowed through what was called the "back marsh" all the time, except about three months in each year—the dry season—during which time "it did not run but a trifle." Some of the witnesses refer to these water-ways as "swales," some call them "marshes," while others call them "depressions" or "hollows"; but by whatever name known or called, they aided very materially in conveying the large portions of the water escaping from the lake to the Skipanon.

Water-course. Whatever may be the rights of conterminous proprietors as to the flow of mere surface water, I do not think it now necessary to consider or determine. The authorities on the subject are not harmonious, and the view I have taken of the facts renders the consideration of that question unnecessary at this time. The water flowing out of Cullaby Lake and seeking an outlet by the Skipanon is not *surface water*. In *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349, it is said: "But the defendant contends that because at a point on his land about five rods above the plaintiff's lands, the water spreads out over the surface, covering a space of a few rods in width, and thus runs upon and across the plaintiff's land, which is a level meadow, and covers the same for several rods in width, irrigating it in a valuable manner through its whole length, being about seven rods, and during this whole length of twelve rods has no defined channel, it ceases to be a water-course, and is to be regarded as surface water, to the flow of which the plaintiff

has no right. If the whole of the stream had sunk into the defendant's soil and no water remained to pass to the plaintiff's land except under the surface, it would have ceased to be a water-course, and the plaintiff would have had no right to it (*Broadbent v. Ramsbotham*, 11 Ex. 602; *Buffum v. Harris*, 5 R. I. 243), or if the water had only flowed in temporary outbursts, caused by melting snow or by rain, it would have been surface water, as in *Ashley v. Walcott*, 11 Cush. 192. The defendant might have diverted it, and the plaintiff might have raised barriers on his land to prevent its flowing upon their lot below. (*Gannon v. Hardagon*, 10 Allen, 106; 87 Am. Dec. 625; *Franklin v. Fisk*, 13 Allen, 211; 90 Am. Dec. 194.) But where, owing to the level character of the land, it spreads out over a wide space without any apparent bank, yet usually flows in a continuous current and passes over the surface to the lands below, it still continues to be a water-course." (*Gillett v. Johnson*, 30 Conn. 180.) So in a somewhat analogous case (*Palmer v. Waddell*, 22 Kan. 352) it is said: "If the face of the country is such as necessarily collects in one body so large a quantity of water after the heavy rains or melting snows as to require an outlet to some common reservoir, and if said water is regularly discharged through a well defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is a natural water-course." And Gould on Waters, section 264, is to the same effect. It is there laid down as an elementary principle that "a stream does not cease to be a water-course and become mere surface water, because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." So, also, in *Shields v. Arndt*, 3 Green Ch. 246, the same principle in effect was thus stated: "A spring on the defendant's land, sixteen rods from the land of the plaintiff, supplied a small stream of water that ran to the plaintiff's land, the water as it came from the spring being sufficient to fill a half-inch pipe, and the flow being constant and nearly uniform except in very dry times, when it

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failed to run. For seven rods the stream descended rapidly in a well defined course to a piece of marshy ground, when it spread so that its flow was slight and not sufficient to break the turf, but was generally sufficient to form a continuous sluggish current along the surface in a natural depression to a watering place within the plaintiff's line. This was adjudged to be a *water-course* within the meaning attached in law to that term."

That the water in question is something more and different from mere *surface water* is evident. It is water which has accumulated from spring rains and melting snows, and which has flowed for several miles between regular banks of a well defined water-course. Its accumulation in Cullaby Lake is constant, and an outlet for it is absolutely necessary, or the whole region thereabout must be inundated. Neacoxie Creek is entirely closed, and of necessity the accumulating waters have flowed across the defendants' lands. It seems to me that in such a case the flowage must be deemed a *water-course* and not mere surface water, and therefore, the erection or maintenance of the dike in question is unlawful. In reaching this conclusion I have expressly avoided the consideration of the doctrine of dominant and servient heritage of the civil law respecting the natural flow of surface water (*Hoyt v. City of Hudson*, 27 Wis. 656), or whether or not the rule of the common law is the same. (*Bellows v. Sackett*, 15 Barb. 96.) These are questions which must attract the consideration of this court when a case shall be presented requiring their determination; but this case is decided on other and different principles.

It follows that there must be a decree in favor of the plaintiff perpetually enjoining the maintenance or repair of the dike mentioned in the complaint; but inasmuch as the questions litigated are to some extent of a public nature, and the defendants acted in good faith in the premises, neither party will be allowed costs against the other.

Points decided.

[Filed April 14, 1888.]

WILLIAM N. NORTHROP ET AL., APPELLANTS, v. P. A.
MARQUAM, RESPONDENT.

16	173
21	505
18*	449
23*	906

16	173
32	425

16	173
44	394

INTESTACY — CHILD NOT NAMED OR PROVIDED FOR. — Under section 3075 of Hill's Code a testator is deemed to have died intestate, as to any child or children, or the descendants of any such child or children, in case of their death not named or provided for, although born after the making of such will or the death of the testator.

WILL — CHILD NOT NAMED OR PROVIDED FOR. — The will may be valid and effectual as to all the children named or provided for therein, but as to those not named or provided for, it is no will, and such child or children will take under the law of descents in all respects as if no will had been made.

POSTHUMOUS CHILD — DESCENT. — A child *in ventre sa mere*, not named or provided for in its father's will, takes by inheritance its proportionate interest in its father's estate.

WILL — SALE OF PROPERTY BY EXECUTION. — Under section 1155, when a testator makes provisions in his will for the sale of land of which he died seised, the executors may sell the same by virtue of the power conferred by the will; but such sale must be reported to the County Court, and confirmed as in other cases of sales of real property by executors and administrators.

WILL — SALE BY EXECUTORS. — In case of a child or children not named or provided for, a sale by the executors under the will transfers to the purchaser all that the executors could lawfully sell; but the interest of such child or children not named or provided for being excepted out of the will by the statute, remains unaffected by such sales.

WILL — EQUITABLE CONVERSION. — A will which directs the sale of the real estate of the testator by the executors, does not work an equitable conversion of the interest of a child or children not named or provided for by the will.

STATUTE OF LIMITATIONS — INFANCY. — Section 17 of the Code, as amended in 1878 (Hill's Code, § 17), repealed the exception of infancy in that section, thus placing all of the disabilities mentioned therein on the same footing.

INFANT — TIME WITHIN WHICH HE MAY SUE TO RECOVER REAL PROPERTY. — An infant has fifteen years after a cause of action accrues to him in which to sue to recover his lands, unless he should become of age after the ten years have elapsed and before the expiration of five years thereafter, in which case the time for the commencement of the action would be one year after the disability ceased.

TENANTS IN COMMON — ENTRY BY ONE. — The general rule is that an entry by one tenant in common is not hostile to the rights of his co-tenants, but is for their benefit as well as his own.

TENANTS IN COMMON — OUSTER. — One tenant in common may oust his co-tenant, and make his possession adverse.

TENANTS IN COMMON — OUSTER — NOTICE — STATUTE OF LIMITATIONS. — To make the possession of a tenant *adverse*, the co-tenant out of possession must have notice of such exclusive and hostile claim, and the Statute of Limitations only begins to run from the time of such notice.

CASE IN JUDGMENT. — H. was born in the month of February, 1871; M., owning three fourths of the land, and she one fourth, entered into the possession of the same on the 3d of April, 1871. *Held*, that she was entitled to notice of the hostile character of his claim. This notice could not be given or imparted to her until she was capable in law of receiving it. H.'s as well as the plaintiff's infancy made it impossible to charge or affect them with notice of the nature,

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character, or extent of the defendant's claim, or of the nature of the title under which he entered, and therefore they were not ousted, and the defendant's possession never became adverse.

STATUTE OF LIMITATIONS—WHEN ONCE COMMENCED TO RUN, NOT STOPPED OR ARRESTED.—The rule is of almost universal application, that when the Statute of Limitations is set in motion, or commences to run, it will not cease to be arrested by any subsequent event not within the saving clause of the statute.

APPEAL from Multnomah County.

Moreland & Masters, for Appellants.

Mitchell, McDougall, Tanner & Bower, for Respondent.

STRAHAN, J.—This is an action of ejectment to recover an undivided one fourth of certain real property situated in Multnomah County.

This cause was tried before the court without a jury, and the following facts and conclusions of law were found by the court:—

1. That Henry C. Northrop, being an inhabitant of Multnomah County, Oregon, died in said county on the twenty-seventh day of June, 1870, seised and possessed at the time of his death of the undivided half of the whole tract of land described in the complaint herein, and J. C. Van Rensselaer was seised and possessed of the other undivided half.

2. That said Henry C. Northrop left surviving him his lawful wife, Mattie V. I. Northrop, and the following named living children, to wit, William N. Northrop, Sarah Ella Northrop, now called in the complaint Ella Middleton, and Courtland J. Northrop, and there was born of his said wife, Mattie V. I., after his death, a lawful child of said Henry C. Northrop, on the eighteenth day of February, 1871, which child was named Hettie Northrop, and died on April 15, 1873.

3. That the sole heirs at law of said Hettie Northrop, deceased, were her mother, said Mattie V. I., and her brothers and sisters named in finding number 2 above; and said Mattie V. I. died intestate on the fourteenth day of January, 1874, leaving surviving her the three children above named, to wit, William and Courtland J. Northrop, and Ella Middleton (then Ella Northrop), who are the sole heirs at law of Mattie V. I. as well as of said Hettie.

4. That on the eleventh day of June, 1870, said Henry C. Northrop made his last will and testament, of which a copy (omitting formal parts) reads as follows:—

“1. I hereby constitute and appoint my beloved wife, Martha V. I. Northrop, to be executrix, and my beloved brother-in-law, Leander Quivey, to be my sole executor of this my last will and testament, directing them to pay all of my just debts and funeral expenses out of my estate. (2) I hereby give, devise, and bequeath unto my said beloved wife, Martha V. I. Northrop, lot number one (1), in block number two hundred and three (203), in the city of Portland, aforesaid, the same being the homestead which we now occupy, and also all my household goods, furniture, clothing, silverware, pictures, and jewelry, to be received and held by her as her own property in her own right forever. (3) It is my will, and I do hereby direct, authorize, and empower my said beloved executrix and executor to sell at private or public sale, at such time or times, and at such prices as they shall deem expedient, all the rest and residue of my real estate, or such part thereof as they deem advisable, and the avails thereof to place at interest or re-invest, and the rents, issues, and profits thereof apply to the support of my said beloved wife, and the support and education of my said beloved children, hereinafter named, until they become twenty-one years of age. (4) All my property except such portion thereof as is hereinbefore given, devised, or bequeathed to my said beloved wife, or the avails thereof in case of sale as aforesaid, and all the rents, issues, and profits thereof, except such as may be consumed in the support of my said beloved wife, and in the support and education of my beloved children, hereinafter named, I hereby give, devise, and bequeath unto my said beloved wife, and to my beloved children, Sarah Ella Northrop, William N. Northrop, and Courtland J. Northrop, share and share alike; the shares of my beloved children to be paid over to them by my said executrix and executor as such children shall become twenty-one years of age.” Which said will was duly admitted to probate in the County Court of Multnomah County, on the ——— day of July, 1870, and Mattie V. I. Northrop and

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Leander Quivey, named therein, duly qualified and acted as executors of said will.

5. That the plaintiffs, William N. Northrop, Ella Middleton, and Courtland J. Northrop, are the identical persons named in and described in said last will as the children of said Henry C. Northrop.

6. That on the 18th of July, 1870, the executors of said last will filed in the said County Court a petition for an order to sell the property of said Henry C. Northrop, deceased, of which a copy reads as follows:—

“The undersigned executrix and executor of the last will and testament of Henry C. Northrop, deceased, respectfully represents unto this honorable court that said deceased by his last will and testament intended to and did provide for the support of his widow, and the support and education of his children, from the revenue of the avails of his real estate not devised as by reference to his last will and testament admitted to probate on file in this court, will fully and at large appear that there is no personal property of the estate of said deceased exempt from execution not bequeathed by said last will and testament, to be set apart for the support of the widow and children of said deceased, and that all of the property of said estate not bequeathed is insufficient to pay the debts and testamentary expenses of said estate, although the estate of said deceased is sufficient, as we believe, after the payment of all debts and liabilities, to afford a reasonable support to such widow and children. Wherefore and because the widow and children of said deceased are and will be without the means of support except from the sale of such real estate, the undersigned pray that the personal property of the estate of said deceased be sold by said executrix and executor, at public or private sale in their discretion, and the proceeds thereof be applied toward the settlement of said estate, and also that the following described real estate be sold by such executrix and executor agreeable to the statute in such case made and provided, and the proceeds be re-invested or placed at interest, and the rents, issues, and profits, and increase be applied to the support of the widow and the support and education of the children of said deceased.

"Said real estate of said deceased not devised and herein placed to be sold is described as follows, to wit: The undivided half of lot number 5, in block number 112, in the City of Portland, in the county of Multnomah, in the State of Oregon; also the undivided half of 320 acres more or less of land, situate in Marion County, in the State of Oregon, in township 6 south, of range 2 west, deeded by Anson Mohart and wife to Henry C. Northrop and J. C. Van Renssalaer, and covered by notification No. 396, and also the undivided half of all that part of the donation land claim of Thomas Stephens in the county of Multnomah, in said State, beginning at the southeast corner of said land claim, and running thence west 80 chains, thence north at right angles with said last mentioned line 36 chains and 25 links, thence east parallel with said first mentioned line 76 chains and 25 links to the south bank of the Willamette River, and thence south, following the meanderings of said river to the place of beginning, containing 271½ acres, less the amount thereof heretofore sold by deceased and J. C. Van Renssalaer, amounting to about 10 acres more or less, and also the west half of the northeast quarter, and the east half of the northwest quarter of section 28, in township 1 south, of range 1 east, in the Willamette land district in said State, containing 160 acres of land.

"The undersigned, Mattie V. I. Northrop, aged twenty-eight years, is one of the legators and heirs of said deceased, and Sarah E., aged eight years, William N., aged six years, and Courtland J. Northrop, aged two years, are the children and sole remaining heirs and legators of said deceased, and all reside in the city of Portland, in said county of Multnomah. All of which is respectfully submitted.

"MARTHA V. I. NORTHROP, Executrix.

"LEANDER QUIVEY, Executor.

"STATE OF OREGON, }
MULTNOMAH COUNTY. } ss.

"I, Leander Quivey, one of the petitioners in the foregoing petition, being duly sworn, say that I verily believe that the

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foregoing petition by me subscribed, and the matters and things therein contained, are true.

“Subscribed and sworn to this eighteenth day of July, A. D. 1870.

“C. W. PARRISH, Clerk.

“By JAMES W. DAVIS, Deputy.”

On which petition said County Court, on the first day of August, 1870, made an order in words and figures following, to wit:—

‘In the matter of the estate of Henry C. Northrop, deceased. Now, on this day, based upon the application of the executrix and executor of the last will and testament of Henry C. Northrop, deceased, heretofore filed in this court, it appearing to the court that Martha V. I. Northrop, widow, Sarah E., William N., and Courtland J. Northrop, children of said deceased, have been duly served with citation more than ten days before the first day of this term of this court, and William P. Doland, heretofore appointed guardian *ad litem* for each of said children, having appeared and being satisfied that the sale prayed for in said application is authorized by the last will and testament of said deceased, and that no reason exists why the prayer of said petitioner should not be granted, and the court having duly considered said premises, and being satisfied that said petition and the matters and things therein contained are true, and that the prayer of said petition ought to be granted, it is, therefore, hereby ordered by the court that Martha V. I. Northrop, executrix, and Leander Quivey, executor of the last will and testament of Henry C. Northrop, deceased, be, and they are hereby authorized to sell as upon execution all the right, title, and estate of the said deceased in and to the following described real estate, that is to say, the undivided half of all that part of the donation land claim of Thomas Stephens, in the county of Multnomah, in the State of Oregon, beginning at the southeast corner of said land claim, and running thence west 80 chains, thence north at right angles with said last mentioned line 36 chains and 25 links, thence east parallel with said last mentioned line 26 chains and 25 links to the south bank of the Willamette River,

and thence south following the meanderings of said river to the place of beginning, less the amount sold thereof by deceased and J. C. Van Renssalaer; and it is further ordered by the court that the proceedings of the sale of said real estate be placed at interest or re-invested, and the rents, issues, and profits, and increase thereof, be applied to the support of the widow, and the support and education of the minor children of said deceased, until such children become twenty-one years of age, or until the further order of the court."

7. That after the order of said County Court, made as aforesaid, the said executors gave notice of sale of the land described in the said order as upon execution, and pursuant to said notice did, on the seventh day of January, 1871, sell the undivided half (being the interest of the deceased), in and of the west half of the whole tract described in said proceedings, and said sale was at public auction, and the defendant said P. A. Marquam was the highest bidder and the purchaser of said sale for the price of \$1,706.25, which sum was duly paid by said Marquam to said executors, agreeable to the terms and conditions of said sale. The said executors made due report of their proceedings and of all matters concerning said sale to said County Court, and said court made an order dated February, 1871, confirming said sale, which order is in words and figures following, to wit:—

"In the matter of the estate of Henry C. Northrop, deceased. Now, on this day, Martha V. I. Northrop, executrix, and Leander Quivey, executor of the last will and testament of Henry C. Northrop, deceased, having made report and return of their proceedings in the sale of a portion of the real estate of said deceased agreeable to the order of this court authorizing such sale, bearing date August 1, A. D. 1870, which said report and return is filed in this court, and the court having duly examined and considered said proceeding and being satisfied that said sale was regular in all things, and the sum bidden for the same (bidden for the property) proportionate to the value thereof, and that said property would not bring a higher price upon resale, and that said sale was legally made, fairly conducted,

and fully authorized by the last will and testament of said deceased, and no objection having been made or filed to a confirmation of said sale, therefore it is hereby ordered and adjudged that said sale be, and the same is hereby confirmed, and that said executrix and executor execute a conveyance for the premises sold to the purchaser agreeable to the terms of the sale," which said order was entered of record, A. D. 1871, and said executors thereupon executed and delivered to said P. A. Marquam a deed dated February 1, 1871, reciting in full said orders, and in form conveying in fee the undivided half of the west half of the whole tract described in the complaint.

8. That on the fourteenth day of March, 1871, the fact of the birth of the posthumous child Hettie above mentioned was made known to said County Court, and it undertook without citation of said heirs to appoint W. P. Doland guardian *ad litem* for it, by an order of that date, and a petition of said executors of date November 11, 1870, for an order to sell the real property of said estate at private sale, being on file, said executors, on the fourteenth day of March, 1871, filed a further petition for a modification of the order to sell as upon execution made as aforesaid on the first day of August, 1870, so as to allow the residue of the land in said order mentioned to be sold at private sale, whereupon the said court made the following order, to wit:

"In the matter of the estate of Henry C. Northrop, deceased. Application of the executrix and executor for a modification of the order for the sale of lands heretofore made. Said executrix and executor appearing by A. E. Wait, Esq., their attorney, and the minor heirs of said deceased appearing by W. P. Doland, their guardian *ad litem*, and making no objections thereto, and the court having examined the petition of said executrix and executor and heard the statement of the parties, and being satisfied that said application ought to be granted, and that a sale of said land at private sale is fully authorized by the will of deceased, it is hereby ordered that the order of this court heretofore made on the first day of August, 1870, for the sale of land by said executrix and said executor, be so modified as to allow them to sell said lands at a private or public sale, at such

times and at such prices as they deem expedient, and for the best interest of said estate, and said order is hereby modified accordingly, and said sales may be made for either cash down or on a credit, as said executrix and executor deem best, and if on credit to be secured by mortgage."

9. That said executors thereupon in form sold at private sale to said P. A. Marquam the right, title, and interest which said Henry C. Northrop had at the time of his death in the east half of said tract of land for the price and sum of \$6,450, which said Marquam duly paid according to the terms of said order, and said executors made return in writing under oath to said County Court of their proceedings concerning said sale, and said County Court, by an order made the seventeenth day of March, 1871, confirmed said sale, and directed conveyance to said purchaser in manner as follows, to wit:—

"Now on this day comes on to be heard the report of sale of land by the executrix and executor of said estate heretofore filed, and the minor heirs of deceased being present by W. P. Doland, their guardian *ad litem*, and being satisfied thereunto, and no objections being filed or used against said sale, and the court having fully examined the proceedings concerning said sale, finds from said report and the proofs submitted to the court that said executrix and executor, on the fifteenth day of March, 1871, by virtue of special provisions contained in the last will and testament of deceased, and in accordance with special directions contained therein, in reference to the sale of lands belonging to said estate, and in pursuance of the order of this court heretofore made and sold to P. A. Marquam, the remaining interest of said deceased in and to that portion of the land claim of Thomas Stephens, heretofore owned by said deceased and J. C. Van Renssalaer, and particularly described in the inventory heretofore filed in this court of said executrix and executor, that is to say, the undivided half interest in and to the east half of said tract of land, containing, after some thirteen acres heretofore sold by said deceased and J. C. Van Renssalaer, about one hundred and thirty acres of land; that the same was sold at the rate of one hundred dollars per acre, or fifty dollars

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per acre for the interest of deceased, it being an undivided half interest in said land, five hundred dollars to be paid down in gold coin on delivery of deed, balance in like gold coin in five years, with interest at ten per cent per annum, to be secured by mortgage. That said Marquam was the highest bidder, and the said price was the highest price bid for said land, and said price was not disproportionate to the value of said land, and a greater price cannot be obtained for said land at a resale; that said sale was fairly made and legally conducted, and was expedient, and was for the best interest of said estate and the heirs thereof. It is therefore ordered, directed, and decreed that said sale be in all respects approved and confirmed, and that said executrix and executor make and execute to the purchaser a good and sufficient deed to said premises, and take notes secured by mortgage for the balance of the purchase price."

10. That said executors, on the third day of April, 1871, in pursuance of said order, the alleged power in said will set forth, made a deed purporting to be in fee of the undivided half of the east half of said tract first by order of August, 1870, directed to be sold.

11. That both said deeds, that of February 7, 1871, and that of April 3, 1871, contained descriptions of the land purporting to be conveyed by metes and bounds and courses and distances, and the descriptions in the two deeds taken together covered and included all the tract of land described in the complaint herein; and said P. A. Marquam at the date of the deed last above mentioned had acquired all the interest of J. C. Van Renssalaer in said tract of land, and claimed to own the whole in fee and in severalty.

12. That the defendant immediately after the execution and delivery to him of said deeds by said executors, to wit, April 3, 1871, entered into actual possession of the whole tract of land covered by the description in said deeds, being the same tract mentioned in the complaint herein, claiming to own the same, and every part and portion of the same, in fee and in severalty, and has continuously since said date until the commencement of this action been in possession thereof, and has continuously

claimed to be the sole and exclusive owner of, and has exercised acts of ownership over the same in manner following. He went personally on and over the tract every two months during said period, and much of said period he was on and over said land as often as once a week, and during all said period has actually occupied, by tenants paying him rent, some portion of said tract. He had surveys made and private roads located. He fenced small parcels within the tract cultivated by his tenants' several small parcels, built or caused to be built upon the tract in different places, in all ten houses, in some or all of which tenants have lived paying him rent. He leased a portion of the tract for a saw-mill which a tenant built and operated on the tract. He had the brush and timber on several acres cut down and slashed. He sold considerable quantities of timber on said tract for cord-wood and saw logs. He has paid the taxes levied on the land, and his claim to own the same has been notorious, open, and public, and he has been during all said period reported to be the owner of said land, and has claimed the same adversely to the said Hettie Northrop and the plaintiffs herein.

13. That the defendant Marquam had no knowledge of the birth or existence of said Hettie Northrop prior to March 14, 1871.

14. That after the appointment and qualification of said executors, and before said sale, appraisers of the estate of said H. C. Northrop, deceased, had been appointed by said County Court, and had appraised said tract of land in controversy in this action at \$3,000, and the whole estate of said deceased at \$10,309.50.

15. That the tract of land belonging to said estate and described as part of section 28, T. 1 S., of R. 1 E., containing one hundred and sixty acres, remained unsold and undisposed of at the date of the commencement of this action.

On motion of counsel for the plaintiffs the court made the further findings of facts upon points suggested as follows:—

Finding 17. That the granting and descriptive parts of the deed of date April 3, 1871, mentioned in finding 10, are in words and figures following, to wit:

"Now this indenture further witnesseth that the said party of the first part, by virtue of the last will and testament of said deceased, and in pursuance of the order of this court heretofore made, and the statutes in such cases made and provided, and in consideration of the sum of \$6,450 United States gold coin, by the said party of the second part to the party of the first part in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, and to his heirs and assigns in fee-simple forever, the undivided half interest in and to the aforesaid premises, and more particularly described as follows, to wit: Beginning at the southeast corner of Thomas Stephens' donation land claim at low-water mark on the Willamette River, thence down said river as follows, N. 23, W. 12.50 chains; N. 22, W. 7 chains; S. 62, W. 4.57 chains; N. 36.30, W. 3.33 chains; N. 70, E. 4.98 chains; N. 1, W. 2 chains; N. 21, E. 9.50 chains; N. 9, E. 5.21 chains; to the northeast corner of this tract, thence W. 9.44 chains to east line of macadamized road, 40.34 chains, to northwest corner of this tract, from which a maple 10 inches in diameter bears N. 73½, W. 56 links distant, a fir 10 inches in diameter bears N. 77, E. 31 links distant, thence south vari, 20, 15 E., 17 W. chains; to creek 36.25 chains; to southwest corner of this tract from which a maple 18 inches in diameter bears S. 71, W. 42 links distant, thence east vari, 20 E., 4,512 chains to low-water mark on the Willamette River, the place of beginning, containing 142.07 acres of land subject to the easement of the macadamized road, and excepting," etc.

18. As to the matters in finding 12, the court further finds that the macadamized road in 1871, and thenceforth to the present time, was and is located on the easterly portion of the tract in controversy, and runs across said tract parallel to the Willamette River; that a house and barn and a small enclosure were on a parcel of this tract between the road and the river at the time when defendant obtained the deeds from the executors in 1871, and he immediately went into occupation of this house and barn, built fences, and leased the house. Those

premises were occupied by his tenants until seven or eight years ago, when defendant sold the house and parcel on which it stood. The slashing was done by defendant on the land in controversy between 1871 and 1875. There has not at any time been a fence enclosing the whole tract. The land was, except where small parcels were cleared in order to erect buildings, a forest of heavy fir timber and brush. The greater part of the acts of possession and ownership on the part of the defendant, recited in this finding and in number 12, were done within the ten years next preceding the commencement of this action—the exact date of each act is not shown—the houses built and occupied by defendant mentioned in finding 12 are all but one on the east half of the tract and within the boundaries described in the deed of April 3, 1871.

On the tract mentioned in the deed of February 1, 1871, there has been one house only, and occupied by a tenant of defendant, around which is a fence enclosing two or three acres which have been cultivated and planted in fruit; this improvement has been made within the last ten years, as a small tract in the easterly portion has been leased by defendant and rent paid to him therefor within the five or six years for a brick yard. The aggregate of all enclosures made or actually used by defendant on the whole tract amount to less than fifteen acres and probably to about ten acres.

In 1878 defendant had two hundred cords of wood cut on premises in dispute. On motion of the defendant the court further amended its findings of fact herein by adding the stipulation herein filed September 21, 1887, thereto, and making it a part thereof.

As conclusions of law the court found: *First.* That neither the plaintiffs nor the said Hettie Northrop, nor either of them, nor their ancestors, nor predecessors, nor grantor, has been seised or possessed of the lands described in the complaint, or of any parcel or portion thereof, within the period of sixteen years and upwards prior to the commencement of this action. *Second.* That the defendant P. A. Marquam has been in possession, actual, open, and notorious, by himself and his tenants, of the

whole tract of land described in the complaint continuously, claiming the same adversely to the plaintiffs for more than sixteen years prior to the commencement of this action. *Third.* That plaintiffs are not, nor is either of them, owners nor entitled to the possession of said tract of land described in the complaint, nor any part or portion thereof. *Fourth.* That the defendant is the owner in fee and is entitled to the possession of the land described in the complaint, and is entitled to judgment for the same and for costs and disbursements.

A judgment in favor of the defendant was entered on these findings, from which the plaintiffs have appealed and assigned numerous errors.

The several important questions of law presented by these findings I will now proceed to examine.

1. The first question requiring notice is, what interest did Hettie Northrop have in the land in controversy? She was born after the making of her father's will; she was not named or provided for in the will, and her father died about eight months before her birth. The findings of fact bring the case fully within section 3075 of Hill's Code, which is as follows: "If any person shall make his last will and die, leaving a child or children, or the descendants of such child or children, in case of their death, not named or provided for in such will, *although born after the making of such will or the death of the testator*, every such testator so far as shall regard such child or children or their descendants not provided for shall be deemed to die intestate, and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part." As to Hettie's interest in her father's estate, he is deemed to have died intestate. While the will is valid and effectual as to all the children named or provided for therein, it is no will as to those not named or provided for, and any such child will take under the law of descent in all respects as if no will had been made. Hettie, therefore, though *in ventre sa mere* at the time of her

father's death, took by inheritance one fourth of all the real property of which he died seised in this State. And by her and her mother's death the plaintiffs have succeeded to her interest.

2. But counsel for respondent claim that conceding this to be true, the will conferred authority on the executors to sell the land; that Hettie's interest was divested by the sale by the executors, and that she is compelled to accept her proportion of the proceeds of the sale, and counsel claim that this principle applies to a child not named or provided for in the will. And to sustain this proposition they cite *Hatch v. Bassett*, 52 N. Y. 360; *Power v. Cassidy*, 79 N. Y. 613; 35 Am. Rep. 550; *Wilson v. Wilson*, 54 Mo. 213; *Cronise v. Hardt*, 47 Md. 433; *Allen v. De Witt*, 3 Com. B. 276; *Phelps v. Pond*, 23 N. Y. 69; *Stagg v. Jackson*, 1 Com. B. 206, and some other authorities not accessible to us. And they claim that this doctrine of equitable conversion applies to the interest of a child not named or provided for in the will; but none of the authorities cited sustain that doctrine as applied to a case of a child not named or provided for. By the terms of the statute there is no will as to such child, it is a case of intestacy, and to hold that the estate which comes to him by inheritance in such case could be in any manner affected by the will would be in effect to disregard the plain provisions of the statute. On the other hand, appellants claim that the sale made by the executors is a nullity, for the reason the law regulating the manner of conducting sales by executors and administrators to pay debts was not complied with. If the validity of this sale depended upon the proceedings had in the County Court of Multnomah County for that purpose it would probably be held invalid for all purposes. The essential requisites of the statute under which the executors were attempting to proceed seem to have been pretty effectually ignored. But as to this, it is not necessary to express any opinion, for the reason the will made provision for the sale of the property except Hettie's interest, and under section 1155 of Hill's Code, the executors could sell the same without conforming to the general requirements of title 6, chapter 15, of Hill's Code. The sale then was made under authority of the will, and not under authority

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of the order of the court. It was regularly reported to the courts and confirmed, and a deed made to the purchaser, which transferred to such purchaser all that the executors could lawfully sell under the will. That included the interest in the land of the children named or provided for; but Hettie's interest being excepted out of the will by the express provisions of the statute, remained unaffected by such sale. The purchaser acquired under this sale three fourths of the land attempted to be sold, and thereby became a tenant in common with Hettie in the entire tract. These conclusions were not seriously contested upon the argument; but it seems necessary to state them in order to reach the real contention in this case.

3. Counsel for appellant contend that the Statute of Limitations does not bar the plaintiff's right of entry as long as she labors under the disability of infancy. At the time the defendant entered upon the lands in controversy, the Code contained the following section, saving the rights of persons who labored under certain disabilities:—

“Sec. 17. If any person entitled to bring an action mentioned in this title, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the action accrued, (1) within the age of twenty-one years; or (2) insane; or (3) imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life; or (4) a married woman, the time of such disability shall not be a part of the time limited for the commencement of the action; but the period within which the action shall be brought, except the actions mentioned in section 4, shall not be extended more than five years by any such disability, *except infancy*; nor shall it be extended in any case longer than one year after the disability ceases.”

In 1878 this section was amended so as to read as follows:—

“Sec. 17. If any person entitled to bring an action mentioned in this title, *or to recover real property*, or for a penalty, or for forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued either, (1) within the age of twenty-one years; or (2) insane; or (3) imprisoned on a criminal

charge, or in execution under the sentence of a court for a term less than his natural life; or (4) married women, the time of such disability shall not be a part of the time limited for the commencement of the action; but the period within which the action shall be brought shall not be extended more than five years by any such disability, nor shall it be extended in any case longer than one year after such disability ceases."

This amendment was made in connection with another one at the same time, changing the limitation from twenty to ten years in actions to recover real property. Under the section as it stood before it was amended, persons laboring under the disabilities enumerated were entitled to have five years added to the limitation prescribed by statute, and in case of infancy such person was allowed one year after his disability ceased in which to commence his action. But by striking out the words "except infancy," as was done by the amendment, this disability was placed on the same footing as the others. The saving of the rights of infants is not different from that of the other persons mentioned in the section. They all stand on the same footing, and are governed by the same time. We hold, then, that under this section an infant has fifteen years after a cause of action accrues in which to prosecute his action to recover real property, unless he should become of age after ten years have elapsed, and before the expiration of five years thereafter, in which case the time for the commencement of the action would be one year after the disability ceased. It is contended that this construction is harsh; that its effect may be to deprive the defenseless and helpless of their property. It must be conceded that all of this is true; but it is an argument which must be addressed to the legislative branch of the government, and not to the courts. It is our province to apply the law to the facts of each particular case as it shall come before us, and beyond this we cannot go.

4. But the more important question remains to be considered, and that is, as against Hettie and the plaintiffs who have succeeded to her estate through her and her mother's death, when did the Statute of Limitations begin to run? As has been shown, the plaintiff by his purchase under the will acquired an

undivided three fourths of the land in controversy. He thereby became a tenant in common with Hettie in said land, and when she died her estate descended to her mother and brothers and sisters in equal parts, and upon the mother's death her interest descended to plaintiffs, who were then and have ever since remained minors, and the tenancy in common continued between the plaintiffs and the defendant. We are then to consider whether or not the facts found are sufficient to set the statute in motion at the time of the defendant's entry or afterwards, and thus bar the plaintiffs' right of entry. The general rule is that the entry by one tenant in common is not hostile to the rights of his co-tenants, but is for their benefit as well as his own.

Mr. Freeman, in his work on Cotenancy, section 166, thus states the principle: ". . . Therefore as a general proposition, the entry of one co-tenant inures to the benefit of all. But this proposition is based on the supposition that the entry is made either *eo nomine* as co-tenants, or that it is silently made without any avowal in regard to it, or without notice to a co-tenant that it is adverse. As both have an equal right to the possession, the law presumes that if one only enters and takes the rents and profits he does this act as well for his companion as for himself. And the continuing possession of a co-tenant, whether the entry was made by himself alone or in connection with his companions, is the possession of all the co-tenants." (Freeman on Cotenancy, § 167.) But it is equally well settled that one tenant in common may oust his co-tenant and make his possession adverse. (Freeman on Cotenancy, §§ 221, 229, et seq.) In section 229, *supra*, the author continues: "Another element is necessary in order to make it sufficient to found an adverse holding upon, and that is notice of such exclusive and hostile claim to the joint owner out of possession. When one joint owner is in possession of the whole, the legal presumption is that he is keeping possession not only for himself but for his co-tenants, according to their several interests, and the other joint owners have the right to so understand until they have notice to the contrary; and the statute would only run from the time of such notice." So in *McClung v. Ross*, 5 Wheat. 116, it is said: "That one tenant in common

may oust his co-tenant and hold in severalty is not to be questioned. But a silent possession accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession. The principles laid down in *Barr v. Gratz*, 4 Wheat. 213, apply to this case."

The cases on this subject are collected in three leading cases (Am. Law Real Prop. 121), where the principle is thus stated: "We have several times alluded to the necessity of knowledge on the part of the alleged ousted tenant of the acts said to constitute the ouster before an ouster can be inferred; and it may be stated as the rule, that in all cases the co-tenant must have knowledge of the ouster or disseisin before an adverse possession can be alleged against him. The knowledge must be either brought home to him, or the occupier must make his possession so visibly hostile, notorious, and adverse, as to justify an inference of knowledge on the part of the tenant sought to be ousted or disseised, and of laches on his part, should he under such circumstances fail to assert his rights." So, also, in *Chandler v. Ricker*, 49 Vt. 128, it is said: "In order to sever his relation as co-tenant and render his possession adverse, it must be affirmatively shown that the orator had knowledge of his claim of exclusive ownership, accompanied by such acts of possession as were not only inconsistent with, but in exclusion of the continuing rights of the orator, and such as would amount to an ouster as between landlord and tenant." And in *Culver v. Rhodes*, 87 N. Y. 348, the court reviews many authorities, and states the principle of law applicable in such case thus: "We are thus led to consider the reason and justice of the rule which should measure the adverse possession necessary to effect the ouster of a co-tenant. Assuredly it should be one which requires notice in fact to the co-tenant of unequivocal acts, so open and public that notice may be presumed of the assault upon his title and the invasion of his rights. The adverse possession sets running a limitation which in the end may operate as a bar. It does so only upon the theory that the party disseised has slept upon his rights, and by silence and inaction has waived them. The rule is just if the

ouster or adverse possession is brought home to the knowledge of the owner, or is of such a definite and hostile public character that such knowledge may be fairly presumed; but it is unjust and unreasonable if enforced without such limitation." (*Trustees etc. Town of East Hampton v. Kirk*, 84 N. Y. 220.) "The authorities plainly recognize the reason and justice of such requirement, and with some differences and variations have never drifted away from it. . . . To effect an ouster of the co-tenant there must be an actual, continued, visible, notorious, distinct, and hostile possession. It must be such that knowledge of its existence is brought home to the co-tenant."

Hettie was born about the month of February, 1871; the defendant entered into the possession of said premises on the 3d of April, 1871. To say that she was in any way prejudiced by his entry, or that she had or could receive any kind of notice that his claim was hostile, or in any way inimical to her rights, would be a mockery of justice. She was plainly entitled to notice of the hostile character of his claim. This notice could not be given or imparted to her until she was capable in law of receiving it. Facts which might amount to notice in a case where the party sought to be affected was not an infant can have no application whatever to a case like this.

It is believed that no case can be found where an infant two months old has been affected with notice to its prejudice by the conduct of others. We hold then that Hettie's infancy as well as the infancy of the plaintiffs made it impossible to change or affect them with notice of the nature, character, or extent of the defendant's claims in or to the land in controversy, or of the nature of the title under which he entered; and, therefore, they were not ousted, and the defendant's possession never became adverse. It is true the defendant entered under a deed which on its face purported to convey the entire estate; but this circumstance does not furnish an exception to the general rule already stated, where some of the parties are joint tenants, tenants in common, or coparceners.

In every such case notice of the hostile character of such entry and claim seems to be necessary. What is notice within this

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rule, or how the same may be given, or what facts will constitute notice, it seems unnecessary to consider at this time, for the reason that the disability of the plaintiffs rendered any notice impossible.

The judgment of the court below must be reversed, and the cause remanded for a new trial.

On rehearing had.

[Filed June 8, 1888.]

STRAHAN, J.—A rehearing of this case was allowed for the purpose of enabling the court to further consider a question not made upon the original argument, and which was not noticed in the opinion. The question is, what effect did the Statute of Limitations have upon the interest in the land in controversy which descended to Mrs. Northrop upon the death of Hettie, and which became vested in the plaintiffs upon their mother's death. The same principles of law must be applied to this interest which is applicable to the others, except that if Marquam's possession was adverse during the lifetime of Mrs. Northrop, and she had notice of such adverse possession, then the Statute of Limitations commenced to run as against such interest and was not stopped by her death.

The rule is subject to but few exceptions, that when the Statute of Limitations has once commenced to run in any case it will not cease to be arrested in its operation by any subsequent event not within the saving clause of the statute. (Wood on Limitation of Actions, § 6.) The only essential difference, therefore, between this interest and the others grows out of the question of notice and the manner in which it may be imparted. Mrs. Northrop did not labor under any disability at the time this descent was cast upon her, and she was capable of being informed and having notice of the nature, character, and extent of Marquam's possession, and whether it was adverse or not.

The issue is narrowed down to a few simple questions of fact which must be found upon another trial, the present record being entirely silent on the question of notice. With this modification of the views of the court already expressed the cause is remanded for a new trial.

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[Filed April 16, 1888.]

MEYER, WILSON & CO., APPELLANTS, v. THOMPSON,
DE HART & CO., RESPONDENTS.

STATUTE OF FRAUDS.—The evidence of an acceptance and receipt of a part of the property, under a parol agreement for the sale of personal property for the price of fifty dollars or upwards, when no part of the price was paid at the time of making it, though insufficient to preclude the defendant from claiming that the agreement had not been fulfilled, and its terms complied with, yet may be sufficient to answer the requirements of the Statute of Frauds in that particular.

SAME.—Where T. D. & Co. made a parol agreement to purchase from M. W. & Co. a cargo of the best Lancashire steam coal, then on board of a certain vessel bound to P., at a certain price per ton, amounting to several thousand dollars, and M. W. & Co., in an action against T. D. & Co. for damages for refusing to take and pay for the coal in accordance with the agreement, gave evidence tending to show that when the vessel arrived at P. with the coal on board, an agent of the plaintiffs telephoned from their place of business to the defendants, at their place of business, notice of its arrival, and inquired of them where they wished to have the coal, and the defendants answered, that if the vessel could discharge it where she was without incurring expense or charge to them, they would take it there, but if not, to send the vessel up to their dock; and in pursuance of which the plaintiffs sent the vessel to their dock, which their dock-master had prepared to receive the coal, and discharged thereon thirty or forty tons of the coal; and the defendants' drayman, whom they had instructed the previous night to be at the dock the next morning, when the coal was expected to arrive, to haul it, took from eleven to fifteen tons of the coal to defendants' coal yard, back on another street, which their yard-master by their order had prepared to receive it; that the defendants did not see the coal, or come to the dock where it was being discharged, until after a considerable portion of the thirty or forty tons had been discharged, and the eleven to fifteen tons had been hauled over to the coal yard, and then refused to receive it. *Held*, that the evidence if accredited by the jury would have justified them in finding that there had been such a delivery and acceptance of a part of the coal under the agreement as would take it out of the Statute of Frauds; and that the court should have instructed the jury that if they found the state of facts which such evidence tended to prove, they should find the agreement valid.

CHARGE TO JURY.—Under the statute of this State, it is error for the court to charge the jury as to the effect and value of certain of the evidence given at the trial.

APPEAL from Multnomah County. Reversed.

R. L. McKee, Ira Jones, and George W. Yocum, for Appellants.

Emmons & Emmons, and W. H. Adams, for Respondents.

THAYER, J.—The appellants herein commenced an action in the said Circuit Court against the respondents upon a contract for the sale of certain coal from the former to the latter. They

alleged in their complaint that on or about the twentieth day of August, 1884, they sold to respondents a shipment of coal, consisting of 611 and a fraction tons of the best Lancashire steam coal, at the agreed price of \$7.50 per ton, amounting in all to \$4,584.59, said coal then being on board the German bark Werra, which was at sea, and was to arrive soon at the city of Portland. That on or about the twenty-eighth day of October, 1884, said bark Werra arrived at said city of Portland with the said coal on board; that afterwards, on or about the ninth day of November, 1884, appellants, at the instance and request of the respondents, and in pursuance of said contract of sale, moved and placed said bark with said coal on board at the respondents' dock, at the foot of Yamhill Street in said city, and then and there as requested delivered said coal to respondents; that thereupon the respondents proceeded to take, and did take out and from said bark, and accept and receive into their possession while said bark was at said dock, about twenty-four and a fraction tons of said coal, pursuant to said sale, and ever since had, and did then retain the same; that after having taken from said bark said last mentioned amount of coal, the respondents refused to receive and take the residue thereof, although often requested so to do by appellants; that upon the persistent refusal of respondents to receive such residue, and to pay for any portion of said coal, appellants gave them notice that they would sell the residue remaining in said bark upon the respondents' account, and hold them responsible for any deficiency in the result, and for the expense of keeping and reselling the same; that thereafter the appellants acting in good faith resold said residue of said coal for account of respondents for the sum of \$2,813.60; that the expense attendant upon the keeping of said residue and upon such resale was \$413.74, which appellants were compelled to pay and did pay by reason of the breaches of said contract by respondent; that respondents had not paid the deficiency, amounting to \$2,184.73, or any part of it, and for which amount the appellants demanded judgment.

The respondents in their answer to the complaint denied all the material allegations thereof, and set up as new matter of

defense that the shipment of coal attempted to be delivered to them had been sold to one C. H. Bacon at the same price as that claimed in the alleged sale to respondents, and was agreed to be taken from the wharf when discharged by the said bark Werra; that said Bacon had not resold the coal, and that at the time of the arrival of said bark at the city of Portland the contract of sale to him was in full force, and that he was liable thereon to appellants according to the terms of the contract, and was ready and willing to receive and pay the cash for said shipment upon its delivery.

The appellants in their reply to such new matter admitted the sale of the coal to Bacon at the price, and upon the terms therein alleged; but they denied any knowledge, etc., as to whether the latter had resold it; denied that the contract of sale to Bacon was in full force, or that the latter was liable to them, or was ready or willing when the Werra arrived to receive or pay the cash therefor. And for a further reply alleged that prior to making the contract with respondents for the sale of the coal to the latter, said Bacon had abandoned and forfeited all his rights under the contract with him, and had refused and declined to fulfill his part thereof, and that appellants were duly notified of the fact and assented to such abandonment; that the contract with Bacon was rescinded by mutual assent of the parties thereto, prior to making the contract with respondents. And for a further reply alleged that when the sale was made to Bacon he was doing business in the city of Portland, engaged in keeping a coal yard, buying and selling coal, and that within a short time after making the contract with him, and before the bark Werra arrived with the coal at Portland, he sold out his coal yard, stock on hand, and business to respondents, and transferred to them all his rights under the contract, and that the respondents duly notified appellants of such transfer, and that the latter assented thereto and released Bacon therefrom, and then made the sale of the coal to respondents, as alleged in the complaint, and for the same price and upon the same terms; and that the latter agreed to receive and accept said coal at said price and on said terms.

The case was tried by a jury, and the respondents recovered a verdict, upon which the judgment appealed from was entered. The grounds of error upon which the appellants rely on the appeal are mainly exceptions to the charge of the court to the jury as to the acceptance of the coal by the respondents. It appears from the bill of exceptions that the appellants gave testimony at the trial, tending to prove the allegations of their complaint and reply.

Mr. E. D. McKee, the general managing agent of respondents for their house in Portland, testified as follows: "On or about the twentieth day of August, 1884, I sold six hundred tons of the best Lancashire steam coal to the firm of Thompson, De Hart & Co., which coal was to arrive by the German bark Werra. In the latter part of August, 1884, I had a conversation with Mr. Honeyman, of Thompson, De Hart & Co., in regard to some coal. I wanted to sell him another cargo. It occurred in this way. He says: 'Well, I will not take another cargo now because we have a cargo coming from you that we took from Bacon.' I asked him if he knew the terms of that contract, and if he would take it on the same terms, and he said: 'Yes.' I asked Mr. Honeyman if he had the contract; he said: 'Anyway if I have not the contract, I have seen the contract;' and he said he would take it on the same terms. The plaintiffs are partners now, and have been for three years before I made this contract. The bark Werra arrived here in the river in the latter part of October, 1884, and I telephoned up from my office to Thompson, De Hart & Co., and asked them where they wished the coal. They answered and said if the bark could discharge it where she was, back of our dock, without incurring wharfage or charge to them, they would take it there; but if we could not to send the bark up to their dock at the foot of Yamhill Street. We could not discharge the coal on our dock without charge, and so we sent the bark up to their dock, and the next morning there was forty or fifty tons of the coal discharged on defendants' dock. I think it was Mr. R. H. Thompson that telephoned back to me to send the bark up to their dock if it could not be discharged without cost to defendants.

Defendants hauled from their dock to their coal yard on Fourth and E streets about from eleven to fifteen tons of the coal that was unloaded on their dock, and then, about that time, they stopped the ship from unloading, and told me they would not take the coal, and they did not take any more of it."

The appellants then introduced evidence tending to prove that respondents ordered their drayman to remove said coal from respondents' dock to their coal yard over on Fourth and E streets, in Portland, and that in obedience to said order said drayman did remove and haul from fourteen to fifteen tons over to their said coal yard, and introduced evidence tending to prove that respondents ordered their warehouse or dock-master, Mitchell, to prepare the dock to receive this coal, and that he did prepare this dock, and that forty or fifty tons were discharged on the dock; and that respondents ordered their yard-master, Walter S. Thompson, to prepare the yard and get it ready to receive this coal, and he did prepare it, and he did receive from ten to fifteen tons hauled there by their drayman, and that respondents paid the drayman for his services.

It also appears from the bill of exceptions that on the trial of said action, R. H. Thompson, one of said defendants, admitted that at the time E. D. McKee telephoned up to defendants asking them where they wanted the coal, he, for defendants, telephoned back to McKee in answer, "to send the bark up to defendants' dock unless the plaintiffs could discharge the coal at plaintiffs' dock without charge to defendants." And it was admitted by defendants that forty or fifty tons were discharged on their dock, and that their drayman who did all their hauling was ordered the night before the coal was discharged to be on hand the next morning to haul the coal, and that said drayman commenced at the usual hour in the morning and did haul from eleven to fifteen tons to defendants' coal yard. And it is admitted that defendants did not at any time examine or inspect the coal until after several tons had been discharged upon their dock, and that defendants did not see the coal or come to the dock where it was being discharged until after a considerable portion of the forty or fifty tons had been discharged,

and the eleven to fifteen tons had been hauled over to their yard.

The court in its instructions to the jury gave among others the following: "The mere receiving, that is, taking into their possession by the defendants of some portion of this coal, without intending to accept it as an act completing the contract, or as a partial delivery of the thing bought, would not be enough. You must find from all the evidence in the case, from all the acts of the defendants, taking them all into consideration (if you find the contract and agreement was made that I have spoken of) that what the defendants did in regard to obtaining possession, or taking possession of that coal which was taken out of the vessel, was with the intention to buy the cargo and accept so much as a partial delivery of the cargo or the amount bought. The circumstance that this drayman took the coal from the wharf and carried it down to their yard is not alone sufficient; nor the circumstance that the wharfinger, Mitchell, prepared the wharf for the reception of the coal, and attended to the receiving of it on the wharf, is not alone sufficient. But you should take into consideration all that they did from the time of directing the vessel to be brought to their wharf and unloaded up to the time when they countermanded the order for unloading the coal, or directed it to be countermanded, and ask yourselves and answer the question under the testimony: 'What did they mean or intend by it?' Did that order to the drayman to be on hand early in the morning, leaving him to do as he was accustomed to do when cargoes of coal would be unloaded for them, take it up to their yard, without being themselves present until a later hour in the day, indicate an intention to take the coal in fulfillment of the contract? to accept it as well as to receive it into their possession? If you find from all the testimony—if you believe from all the testimony—that that was the intention, then you have a right to consider and should consider the contract as completed."

The court also gave the following instruction: "Then if you find there was a contract made and completed as I have defined it to you, and that the coal answered the description in the con-

tract as best Lancashire steam coal, and if the defendants refused to take it, then your next inquiry is, did the plaintiffs give notice to the defendants of their intention to sell the coal on account of defendants, and hold defendants responsible for the deficiency between what they could obtain for it and the contract price? That notice need not have any particular form. It need not have been in writing. If it was made known to the defendants that such was the intention of plaintiffs that is sufficient."

Exceptions were duly taken to these two instructions, and they constitute the principal exceptions relied upon by the appellants on appeal.

The question in the Circuit Court involved the validity of the alleged agreement to purchase the coal. The agreement not being in writing, and no part of the purchase money having been paid, it was incumbent upon the appellants in order to take the case out of the Statute of Frauds to prove that some part of the coal had been accepted and received by the respondents. The courts have attempted from time to time to establish in such cases certain tests as to what constitutes an acceptance and receipt of some part of the property; but owing to the fact that a shade of difference is generally found to exist between the various cases, such tests have not been of much practical use. Almost every one, I apprehend, will conclude, after an examination of the numerous and somewhat conflicting decisions upon the subject, that the intention of the legislature would as often and as effectually be carried out by observing and following the terms of the statute itself, as by attempting to keep in line with the thousands of adjudications which have been had regarding it.

The statute obviously intended that something more than the negotiations of the parties to an oral agreement for the sale of personal property at the price of fifty dollars or upwards should be shown in order to render it valid; that mere words would not be sufficient; that an overt act of the parties corroborative of the fact of the agreement was essential to make it binding. It required that the buyer accept and receive some part of the property, or pay at the time some part of the purchase money, otherwise the bargain would have no force. It did not intend

to require an over-nice performance of such acts. It was enacted in view of the mode and manner in which business affairs were usually conducted. It was not adopted to obstruct the free course of trade, nor to afford an excuse for violating commercial integrity. The acceptance and receipt of some part of the property were expected to occur in the usual way. The acceptance is not necessarily inferable from the mere receipt of the property. The vendee, as was said in *Benjamin on Sales*, must have exercised, or have had the means of exercising his right of rejection before he can be claimed to have accepted it. The agreement may be, and often is, to purchase a particular kind, quality, or grade of commodity, which is subsequently delivered to the buyer without his having had an opportunity to inspect it. The receipt of the article, under such circumstances, would not necessarily constitute an acceptance. *Remick v. Sanford*, 120 Mass. 316, and *Bacon v. Eccles*, 43 Wis. 227, were cases of that kind.

When a party agrees to purchase goods of certain kind or quality, which he has never seen, he should have the right when they are forwarded to him to examine them in order to ascertain whether or not they are such as he bargained for. It is held by the current of authorities that a party is not bound to accept merely because the goods sent are entirely in accordance with the agreement, and therefore he ought to accept. I am satisfied, however, that a more liberal construction of the statute, in a certain class of cases, would not impair its efficacy, and at the same time would prevent a fraudulent use of it.

When a party has promised to accept merchandise which he has agreed to purchase, and it corresponds in every respect with the terms of the agreement, he ought not, when it is sent him, be allowed to reject it upon any frivolous pretext. Such a mode of dealing would occasion a hardship, and tend to destroy confidence in commercial transactions. When a party has been induced to pack and send to a vendee a bill of goods at a considerable cost and trouble, been deprived of the chances of selling them to other customers, the goods have been taken and delivered to the vendee, and opened and inspected by him, he should not, because, forsooth, there has been a decline in the market, be

allowed to resort to the subterfuge that they are not the kind or quality ordered, and be thereby excused from receiving them. The law, especially a statute to prevent frauds and perjuries, should not in deference to any refined subtlety countenance or permit chicanery. Some of the decisions in reference to that question, I am happy to learn, do disprove of such practice.

In *Smith v. Stoller*, 26 Wis. 671, the Supreme Court of that State held, that "where tea, valued at more than fifty dollars, was sold by sample, and a chest of it delivered to the buyer as in pursuance of the contract, which after opening it he undertook to return, it was not error to instruct the jury in substance that if he received the tea with intent to accept it, in case it should agree with the sample, and if they found that it did in fact agree with the sample, then there was a complete acceptance, and he was liable for the price." The same court, in *Bacon v. Eccles*, 43 Wis. 227, suggested that *Smith v. Stoller* was an advance doctrine upon the subject, and that it went as far as the courts could safely go to sustain a constructive acceptance of goods delivered under a parol contract of sale, otherwise void by the Statute of Frauds. But I do not believe that it went any too far; do not think the buyer under the circumstances should have been permitted to claim that he had not accepted and received the article. He agreed to accept and pay for the tea; it was forwarded to him at his request, and answered the description of that which he had agreed to purchase. To hold, therefore, under the circumstances that he had accepted and received it was just.

No formal unequivocal acceptance of the article was shown, as some fastidious courts seem to intimate should be, but he had said he would accept it if of the kind and quality represented; and placed at his refusal to keep it upon the ground that it did not agree with the sample, which ground was proved to be false. If he had notified the vendor upon the arrival of the tea that he would not receive it, that he would not abide by his agreement, was not bound by it, his defense to the action, in my estimation, would have been more tolerable; but when he attempted to add to his own perfidy a disparagement of the

vendor's goods, and to asperse the latter's reputation for fairness and integrity in commercial dealings, he should have been confined in his defense to those grounds.

In the noted case of *Tibbett v. Morton*, 15 Q. B. 428, it was held by the Queen's Bench that there might be an acceptance and receipt within the meaning of the act, without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract; that the acceptance, to let in parol evidence of the contract, was different from that which affords conclusive evidence of the contract having been fulfilled. The doctrine announced in the latter case was put upon the grounds that the buyer had dealt with the goods as owner, and that a constructive acceptance might be inferred therefrom; but I am unable to discover any objection for applying it to a case where it is evident that the buyer intended to waive the right to examine the goods as preliminary to his acceptance and receipt thereof, or has had an opportunity to examine them but neglected to do so; nor to a case where the buyer requests the goods sent him, intending to accept and receive them if of the kind and quality bargained for, and the goods are delivered accordingly, and his refusal thereafter to keep them is upon the grounds that they were *not* of the kind and quality bargained for. Such acceptance and receipt would not, of course, preclude the buyer from showing that the goods did not comply with the terms of the agreement, but would be sufficient to answer the requirement of the statute, and leave the real matter in dispute between the parties open for determination.

In the case under consideration the evidence, as shown by the bill of exceptions, was ample and sufficient, if accredited by the jury, to justify a finding that a part of the coal was accepted and received by the respondents. The agreement by them to purchase the coal, and the arrangement made after the arrival of the bark in the river as to where the coal should be delivered, were testified to by Mr. E. D. McKee, and the latter affair was virtually admitted by Mr. Henry Thompson, one of the respondents. Nor does there appear to have been any conflict in the

evidence as to the bark, with the coal on board, having been moved to the respondents' dock, prepared at their instance for the discharge of her cargo, and of the coal yard being prepared to receive it; and that forty or fifty tons of the coal were unloaded upon the dock in pursuance of the arrangement, and from eleven to fifteen tons thereof hauled therefrom to the respondents' coal yard by a drayman employed by them to haul it.

These several acts of the respondents constituted cogent proof that there was an acceptance and receipt of a part of the property. It is true that the respondents did not inspect the coal until after the discharge of the several tons upon the dock. They did not see it, or come to the dock until after a considerable portion of the forty or fifty tons had been discharged, and the eleven or fifteen tons hauled over to the yard. For that matter, however, they might never have seen the coal and yet be chargeable with its acceptance and receipt. They had the opportunity to see and inspect it before they had any part of it hauled from the dock to their coal yard. I think it was their duty, after they agreed that the coal should be discharged at their dock, to be there before it was unloaded, and exercise their right of acceptance then.

It is held by the authorities upon the subject that the acts of the vendor are not sufficient to answer the requirements of the statute; but the discharge of the coal upon the dock was not the act of the appellants alone; the respondents co-operated with them in the affair as much so as though they had personally assisted in it. But whether the discharge of the coal upon the dock by itself was sufficient or not to constitute an acceptance and receipt of it need not be considered. The hauling away the portion of it by the respondents to their coal yard was their own act, and if it did not amount to an acceptance and receipt of the coal, I can hardly imagine what would. It surely could not be contended that it was done in order to inspect the coal, or for any purpose other than to exercise proprietorship over the property.

In view of the agreement to purchase the coal, and of the

several acts of the respective parties done in pursuance thereof, there can be no other conclusion than that the respondents took and received the part hauled to their coal yard under the agreement and as their own property. The respondents may have been disappointed in the quality of the coal; it may not have been merchantable, and they have had the right to refuse to receive the remainder of it upon that ground. That sort of defense was, perhaps, open to them, and I can see no other question in the case to litigate. It was, of course, for the jury to say whether the evidence referred to in the bill of exceptions was true or not; but if they found it to be true, they should have found that there was an acceptance and receipt of a part of the property sufficient to render the agreement a binding contract between the parties.

The tendency of such evidence was to show that fact, and the court should have so instructed the jury, unless there was other and different evidence in the case from that disclosed by the record before us. The charge of the court to the jury as a matter of abstract law is, in the main, correct; but as applicable to the evidence referred to, was misleading. Altogether too much stress was laid upon the question of the intent of the respondents in their taking and hauling the part of the coal to their coal yard. Parties are supposed to intend the natural and ordinary consequences of their acts. Respondents in taking the coal from the dock to their coal yard could not possibly be presumed, under the circumstances of the case as shown to this court, to have intended anything different than I have indicated.

The jury was evidently led to believe from the charge that the respondents in view of the facts might have had some latent analogous intention in regard to the coal hauled to their coal yard. It unfortunately was calculated to set them to speculating in their minds in regard to what certainly must have been a vagary. No fact is shown of any other intention than that suggested. The coal could not possibly have been taken to the coal yard to inspect its quality; it had no hidden defects evidently. If it was too fine, contained too much waste matter, as some of the witnesses intimated, the fault was patent. The respondents

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had no occasion to remove it to their yard to ascertain that fact. It is laid down in Benjamin on Sales, section 145, and supported by eminent authority, that "if the vendee does any act to the goods, of wrong if he is not the owner of the goods, and of right, if he is the owner of the goods, the doing of that act is evidence that he accepted them." The drayman may have had no authority to accept the coal; but he was directed by the respondents the night before it was discharged upon the dock to be on hand the next morning to haul it to the coal yard, and his act in that respect was the act of the respondents, and which, as I regard it, was a waiver of the right to reject the coal on the grounds of the invalidity under the statute of the agreement to purchase. The intention of the respondents in the affair must be gathered from their acts, and not from some supposed possible condition of their minds. They probably did not think anything about it when they directed their drayman to be on hand to haul the coal, except the taking it under the agreement. They would doubtless have regarded it as an affront if sued for trespass *de bonis asportatis* on account of the act, and have claimed as a defense the right to take the coal as of their own property. Again, the court usurped the functions of the jury when it told them that the circumstance of the drayman taking the coal from the wharf and carrying it down to the coal yard, nor the circumstance that the wharfinger, Mitchell, prepared the wharf for the reception of the coal, was not alone sufficient to establish the intention to accept the coal which was taken out of the vessel as a partial delivery of the cargo, or the amount bought. The jury were the judges of the effect and value of that evidence. Receiving the coal at the dock, and hauling the part of it to the coal yard, were facts of the case which the court had no right to present to the jury.

We had occasion at the last term of this court to consider that question in the case of the *State v. Huffman*, reported in 16 Or. 15. The instruction in regard to the appellants giving notice to the respondents of an intention to sell the coal need not be considered, as the bill of exceptions shows that the appellants introduced evidence tending to prove that they, by their manager,

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Mr. McKee, notified and informed their respondents immediately after the latter refused to take the coal that they, appellants, would sell the coal for account of respondents and charge them with any loss or deficiency. The latter charge, therefore, if erroneous did not injure the appellants. Whether it was erroneous or not we express no opinion. We deem the exception to the other charge to have been well taken.

The judgment appealed from will therefore be reversed and the case will be remanded for a new trial.

LORD, C. J., dissenting. — Upon the arrival of the bark the conduct of the defendants indicate that they acted upon the assumption that the cargo of coal was conformable to their understanding of the agreement, and such as was suitable for the purposes of their trade.

The circumstances under which the contract originated, and the subsequent conduct of the defendants in relation to it, constitute the chain of facts, or the transaction itself, from which the intention of the defendants in receiving the coal, whether absolutely or only conditionally, is to be inferred. The court instructed the jury, in effect, that it was not enough to take any particular fact or isolated circumstances, however decisive it may appear in itself, to determine the question of acceptance; but that all the facts and circumstances surrounding the transaction must be taken and considered together in order for them to determine whether there had been such an acceptance and receipt by the defendants as the law contemplated. This was but giving heed to the admonition of the books, "that it should be steadily borne in mind that the acceptance and receipt contemplated by the Statute of Frauds, and as adjudged by the cases, must always be governed by the circumstances surrounding the transaction, as to whether there has been such acceptance and receipt." (Baker on Sales, § 282 *a*.)

It seems to me that the instruction was a plain and correct exposition of the law.

Opinion of the Court—Strahan, J.

[Filed April 16, 1888.]

**B. VERDIER, RESPONDENT, v. JOHN BIGNE ET AL.,
APPELLANTS.**

CONSTITUTIONAL LAW—JURISDICTION—CIRCUIT COURTS.—By article vii., section 9, of the Constitution, all judicial powers, authority, and jurisdiction not vested by the Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the Circuit Courts.

STATUTE—LIEN BY MORTGAGE.—Section 414 of Hill's Code provides for the foreclosure of a lien created by mortgage by a suit in equity, which jurisdiction is vested in the Circuit Courts.

FORECLOSURE—POWER OF COUNTY COURTS.—Upon condition broken, and the death of the mortgagor, the County Court does not acquire the jurisdiction to afford the mortgagee the relief to which he is entitled.

FINDING—ATTORNEY'S FEES—EXCEPTIONS.—In a foreclosure suit which is tried by the court under section 397 of Hill's Code, a finding by the court in favor of the plaintiff of an amount for attorney's fees is a finding of fact, and will not be reviewed on appeal from the decree, unless the same be excepted to in the court below.

DECREE—HOW REVIEWABLE.—In such cases, section 543 of Hill's Code makes the decree reviewable on appeal *only* as to questions of law appearing on the transcript, and shown by the bill of exceptions.

APPEAL from Multnomah County. Affirmed.

*M. G. Munly, and Watson, Hume & Watson, for Appellants.
Strong & Strong, for Respondent.*

STRAHAN, J.—This is a suit in equity brought by the plaintiff against the defendants to foreclose two mortgages made by Pierre Manciet and Petra Manciet, his wife, both of whom have since died. Pierre before his death made and published his last will, by which he named the defendant Bigne and his wife Petra as his executors. After Petra's death Bigne continued as sole executor. One of the mortgages is dated September 11, 1879, and is to secure a note for eight thousand dollars, payable to Ladd and Tilton; the other is to secure a note for four thousand dollars, dated October 27, 1880, also payable to Ladd and Tilton. Said notes and mortgages are alleged to have been duly assigned to the plaintiff before the commencement of this suit. The plaintiff obtained a decree, foreclosing both of said mortgages in the court below, from which the defendants have appealed. The cause was tried in the court below as an action at law. In other

16 208
22 90
23 490
19* 61
29* 148

16 208
34 43
34 429;

words, it was not referred, and the evidence was not taken in writing.

The only question which counsel for the appellants have sought to make on the appeal of any importance is the jurisdiction of the court under the decree of foreclosure. They insist that when a party executes a mortgage and dies, the Circuit Court is divested of all jurisdiction to decree a foreclosure, and that the payment of the claim which the mortgage was designed to secure must be worked out through an order of sale in the County Court.

1. By article vii., section 9 of the Constitution of the State, all judicial power, authority, and jurisdiction not vested by the Constitution, or by laws consistent therewith exclusively in some other court, shall belong to the Circuit Courts; and section 414 of Hill's Code provides that a lien upon real or personal property other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby, by a suit. Other sections in the same title follow, regulating the method of procedure in such suits. Counsel for appellants claim that this right to foreclose by suit in equity is divested by the death of the mortgagor, and that thereafter the property must be sold by order of the County Court, and they cite section 1141 of Hill's Code. That section declares that no sale of the property of an estate is valid unless made by order of the court or judge thereof, as in this title prescribed, unless herein otherwise provided. If the words "unless herein otherwise provided" refer to any provision of the Code which might relate to the sale of property under the decree of a court after the party had died, then clearly a foreclosure sale would be excepted out of this statute by its own terms. But I do not think this section has the effect to divest or in any manner interfere with the general jurisdiction of courts of equity to foreclose and enforce liens upon real property other than by judgment. It is admitted that the County Court has no jurisdiction to enforce the lien. It may order the property to be sold, and may apply the proceeds to the payment of the debt secured by the mortgage; but in

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such case the lien is not foreclosed. The claims sued on were presented to the executors and allowed by him. In such case, under a statute very much like ours, the jurisdiction of equity has been sustained. (*Hetch v. Porter*, 10 Cal. 535; *Peterson v. Hornblower*, 33 Cal. 266; *Willis v. Farley*, 24 Cal. 499; *Orr's Estate*, 29 Cal. 101; *Fallon v. Butler*, 21 Cal. 24; 81 Am. Dec. 140.)

In *Willis v. Farley*, *supra*, it is said: "The Probate Court does not possess the power to afford the relief to mortgagees to which they may be entitled in the tribunals created for their use by the Constitution; and as a mortgage creditor has the right to foreclose his mortgage upon condition broken, he can invoke the aid of a court competent to afford adequate relief. Hence it is that a creditor of an estate of a deceased person whose debt is secured by mortgage may, after having duly presented it to the executor or administrator and probate judge, whether it be allowed or rejected, proceed at once to foreclose his mortgage in the proper court of original equitable jurisdiction." But there is another provision of the Code which strengthens this construction. Section 1161 of Hill's Code provided for the redemption of mortgaged premises under certain conditions, on the application of an heir, creditor, or other person interested. Section 1162 authorizes the court to order the sale of the mortgaged premises, if upon such application the redemption be deemed not proper or expedient, and section 1163 provides for citing the mortgagee or other person to whom the debt is payable before making an order for the application of the proceeds of the sale, and regulates the proceedings thereon. And finally section 1164 provides: "Sections 1161, 1162, and 1163 shall not be construed to include a mortgage which has been foreclosed, or upon which a suit has been commenced for the foreclosure, before the application for the order of redemption or sale is made. . . ." This last provision is wholly without meaning or effect if the appellants' contention is well founded.

2. The court below allowed an attorney's fee of four hundred dollars for foreclosing one of the mortgages and two hundred dollars for the other. On this appeal counsel for appellants question these items and we are asked to review them.

 Points decided.

These are findings of fact to which no exceptions were taken, nor is there any evidence relating to the subject sent up with the transcript. In such case the finding of fact is not reviewable on the appeal. A suit in equity when tried by the court without an order of reference is conducted in the same manner as an action at law. (Hill's Code, § 397.) The latter part of that section provides: "Exceptions may be taken during the trial to the ruling of the court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action at law, and the same shall be filed with the clerk within ten days from the entering of the decree, or such further time as the court may allow." And section 533, numbered 543, of Hill's Code makes the decree in such a case reviewable only as to questions of law appearing upon the transcript *and shown by the bill of exceptions*.

There being no exceptions to these findings of fact, we decline to look into them or to review them.

The decree of the court below must therefore be affirmed.

[Filed April 16, 1888.]

JAMES MITCHELL, RESPONDENT, v. NELSON SCHOONOVER, ADMINISTRATOR, APPELLANT.

ATTACHMENT—DEATH OF DEFENDANT AFTER LEVY.—The death of the defendant after levy of the attachment does not vacate or dissolve it.

DEATH OF DEFENDANT—ACTION CONTINUED AGAINST PERSONAL REPRESENTATIVE.—If a party to an action die and the cause of action survive, the adverse party may at any time within one year thereafter cause the action to be continued by or against the personal representative of such deceased party.

JUDGMENT—DECEASED PARTY.—A judgment rendered by a court of general jurisdiction against a party after his death is not for that reason void. It is erroneous, but until reversed by some appropriate proceeding it is valid.

DEATH OF PARTY—DELAY OF COURT.—Where a party has so prosecuted his action that he is entitled to a judgment without further contest, or where by delay of the court he fails to obtain judgment when he is entitled to it, and his adversary dies, it is the duty of the court upon proper application to render judgment in favor of such party as of a time when the adverse party was living.

TIME—FRACTIONS OF A DAY—JUDGMENT.—For the purpose of defeating a judgment rendered by a court of general jurisdiction, the legal representatives of a deceased party will not be heard to allege that his intestate died on the same day of the rendition of such judgment, but at an hour previous thereto.

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16 435
17* 897
18* 842

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APPEAL from Union County. Affirmed.

Baker, Shelton & Baker, and *George G. Bingham*, for Respondent.

J. R. Cites, for Appellant.

STRAHAN, J.—On the fourteenth day of June, 1886, the plaintiff commenced this action against Thomas P. Baird and M. B. Baird, to recover eighteen hundred dollars and interest, due on a promissory note, and on the same day sued out a writ of attachment against the property of the defendants. The summons as well as the attachment were served in Union County, Oregon, on the next day after they were issued. On the twenty-seventh day of June, 1886, the defendants appeared by their attorney in fact, Willis Skiff, and filed a demurrer to the complaint, which was on the first day of October, it being the October term of said court, 1886, overruled. On the sixth day of October, 1886, the plaintiff took judgment against the defendants for want of an answer. On the twenty-sixth day of November, 1886, Nelson Schoonover filed a petition entitled in said action, reciting the above facts; and further, that on the sixth day of October, 1886, M. B. Baird died at Union County, Oregon, and after his death plaintiff took judgment against said deceased, and an order for the sale of the attached property which belonged to said deceased. That the petitioner was on the 13th of October, 1886, duly appointed administrator of the estate of M. B. Baird, deceased, by the County Court of Union County, Oregon.

The prayer in substance is for an order allowing petitioner to appear in said action as the duly qualified administrator and legal representative of said deceased, and that further proceedings in said action be taken against the petitioner as such legal representative. Thereafter, on the tenth day of December, 1886, the plaintiff by his attorneys filed a motion to strike Schoonover's petition from the files, which motion was denied on the fourteenth day of December, 1886. Afterwards the plaintiff filed a motion to strike paragraph five from Schoonover's petition,

which recited that judgment was taken against said M. B. Baird after his death. On the twenty-first day of February, 1887, this motion was allowed by the court, and paragraph five was stricken out; and it was further ordered that said cause as to said M. B. Baird, deceased, be and the same is hereby continued in the name of Nelson Schoonover, as administrator of said estate of M. B. Baird, deceased. On the twenty-third day of February, 1887, Nelson Schoonover filed a motion to vacate the judgment as to M. B. Baird, deceased, for the reason that the judgment against said M. B. Baird is void, having been rendered after his death. In support of this motion numerous affidavits are filed. If said affidavits are competent or material, or can be considered, they tend to show that M. B. Baird died at Union, in Union County, Oregon, on the sixth day of October, 1886, at about the hour of five o'clock A. M. of said day, and that the judgment was not entered until after the hour of nine o'clock A. M. of the same day.

The plaintiff filed a motion to strike out these affidavits; the same was overruled, and Nelson Schoonover as administrator was allowed ten days in which to file an amended motion and affidavits. Within the time allowed an amended motion and some additional affidavits were filed. Afterwards, on the twenty-third day of July, 1887, both motions were denied by the court, from which last-named order, overruling his motion to vacate the judgment as to M. B. Baird, deceased, Nelson Schoonover has appealed, and assigns for error the action of the court in overruling his said motion. Schoonover's amended petition to vacate said judgment shows that said M. B. Baird was insolvent at the time of his death, and that the attachment was levied wholly upon the real property of said M. B. Baird, and not upon any of the property of Thomas P. Baird. That fully three thousand dollars of M. B. Baird's debts were due to sureties of said M. B. Baird, who had made advances for him, etc.

The application of Schoonover to vacate the judgment seems to be founded upon two theories: (1) That the death of M. B. Baird dissolved the attachment; and (2) that the judgment is

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void, because it is alleged that he died a few hours before the judgment was entered up.

It may be doubted whether or not the order made in this case refusing to vacate this judgment is an appealable order. "A final order affecting a substantial right, and made in a proceeding after judgment or decree for the purpose of being reviewed, shall be deemed a judgment or decree." (Hill's Code, § 535.) It is not perceived how this order affected a substantial right. No defense to the action was offered or proposed, nor did the appellant offer an answer of any kind. But this question was not suggested at the argument, and the decision will not be placed on this ground.

1. It is conceded that there is no provision of the Code which declares that an attachment will be dissolved by the death of either party. If such a result follows death, it must be gathered inferentially from some provision of the Code, because it is nowhere expressed; but it will be most convenient to see first what effect the death of a party has upon a pending action. Section 38 of Hill's Code declares: "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, allow the action to be continued by or against his personal representatives or successor in interest." And by section 144 it is provided that "the plaintiff may at the time of issuing the summons, or any time afterwards, have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered. . . . From the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith for a valuable consideration of the property, real and personal, attached. . . ."

If effect be given to all of these provisions of the Code, the attachment is not dissolved by death. If a party die, the adverse party may within one year thereafter cause the action to be continued by or against the personal representatives of such

deceased party. And the effect of a judgment in such action is to subject the property attached to its payment. There is some conflict amongst the authorities on the subject, but I think the decided weight of authority, as well as the better reason, is to the effect that an attachment is not dissolved by death, unless some statute expressly so declares. In *More v. Thayer*, 10 Barb. 258, a complaint had been filed and an attachment issued and served, but no summons had been served; but the court had acquired such jurisdiction of the action by the allowance of the provisional remedy of attachment that the defendant's administrator could be brought in and the attached property subjected to the judgment. So in *Perkins v. Norvell*, 25 Tenn. 151, it was held that the death of the defendant did not dissolve the attachment, and that the attached property might be subjected to the payment of the debt by bringing in the heirs by means of a *scire facias*. In *Thatcher v. Bancroft*, 15 Abb. Pr. 243, an attachment was issued, and on the same day the defendant died. Subsequently his executor appeared and defended the action, and judgment was rendered in favor of the plaintiff.

In passing on the question whether the attachment held the property or not, the court said: "The attachment remains in force, notwithstanding the death of the defendant; the revival of the action by the appearance of the executor enables the plaintiff to obtain his judgment. Payment of such judgment out of the attached property can only be obtained through an execution by which the attached property is to be sold." So in *Kennedy v. Raguet*, 1 Bay, 484, an attachment was issued and certain persons were garnished. The garnishees made default and judgment went against them. About the time or immediately after the issuing execution, it was discovered that Raguet, the principal debtor, had died at Bordeaux before the signing of judgment against the garnishees. They therefore moved to set aside the judgment and execution against them, for the reason that the death of the defendant before judgment abated the action and dissolved the attachment. But their motion was disallowed, and they were held liable on the judgment. So, also, in *Holman v. Fisher*, 49 Miss. 472, it was held in effect that if

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a defendant die after the service of a writ of attachment, the writ is not abated, but may proceed to judgment, the court holding that the proceeding thereby became strictly *in rem* under the statute of that State. And the like rule was held in *White v. Heavner*, 7 W. Va. 324, the court saying: "The death of Henry O'Middleton, the debtor, after the attachment was levied on the real property, did not dissolve the attachment or the lien thereof upon the realty attached."

2. But it is argued that this judgment is void, and for that reason it ought to have been set aside. But the authorities do not sustain this position. It must be remembered that the judgment itself is not before us for the reason the appellant took no appeal from it. We are not, therefore, required or permitted to say whether it is reversible for error or not. The only necessary point for us to consider on this branch of the case is, whether or not the court below erred in overruling the appellant's motion for the reason stated therein. The decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause, and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding it is valid.

In *Reid v. Holmes*, 1. 7 Mass. 326, the question came before the Supreme Court of that State, and it was held the judgment was not void. The court said: "If the fact agreed in the case stated of the death of the defendant after the default and before the judgment is competent to be considered, it does not show that the judgment is absolutely void. The court at the time of bringing the former action had jurisdiction of the subject-matter and of the parties, and might after the death of the defendant have rendered judgment against him as of a previous term (*Tapley v. Martin*, 116 Mass. 275; *Kelley v. Riley*, 106 Mass. 339, 341; 8 Am. Rep. 336; *Tapley v. Goodsell*, 122 Mass. 176-181); or the judgment actually entered might, on motion of the plaintiff, have been amended so as to stand as a judgment *nunc pro tunc*, or have been vacated and the adminis-

trator summoned in to defend the action." (*Stickney v. Davis*, 17 Pick. 169.) So in *Case v. Ribelin*, 1 Marsh. J. J. 29, it was held that such a judgment was not void but erroneous; that the error consisted of matter of fact, which, not appearing on the record, the court could not notice it, and that the same was to be corrected by a writ of error *coram vobis*. *Yaple v. Titus*, 41 Pa. St. 195, is to the same effect. And other authorities announce the same principle. (*Hayes v. Shaw*, 20 Minn. 405; *Coleman v. McAnulty*, 16 Mo. 173; 57 Am. Dec. 229; *Camden v. Robertson*, 3 Ill. [2 Scam.] 507.)

3. But under the state of this record at the time M. B. Baird is said to have died, it was the duty of the court to see that the plaintiff was not prejudiced by its delay in entering judgment. The court overruled the defendant's demurrer to the plaintiff's complaint on the first day of the October term. They did not apply for leave to answer or plead further. At the time the demurrer was overruled the plaintiff was then entitled to a judgment according to the prayer of his complaint. His cause of action stood admitted upon the record, and it was the duty of the court to enter judgment against the defendant according to the facts as they were alleged in the complaint. If while the cause is in this condition the defendant dies, the plaintiff is not to lose the fruits of his litigation, and if necessary, it is the duty of the court to enter judgment *nunc pro tunc* as of the previous term, or under our practice an earlier day in that term. This is the common-law rule of practice, and the Code has not changed it.

In *Blaisdell v. Harris*, 52 N. H. 191, after verdict for the plaintiff, the case was transferred to the law term for the consideration of the full bench, upon exceptions taken by the defendant. While the cause was thus pending in the law term the defendant died. Afterwards the defendant's exceptions being overruled, it was held that the plaintiff should have judgment as of the previous term when the verdict was rendered. In *Tapley v. Martin*, 116 Mass. 275, it was held that if after verdict for the plaintiff the defendant dies, the court has power to pass upon the exceptions alleged by him, and if justice requires, to enter

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judgment *nunc pro tunc* as of the term when the verdict was rendered, although no administrator had been appointed in said estate. And the same principle was announced in *Wilson v. Meyers*, 15 Am. Dec. 510. And this practice prevails generally. (*McLean v. State*, 8 Heisk. 22; *Spalding v. Congdon*, 18 Wend. 543; *Currier v. Inhabitants of Lowell*, 16 Pick. 170; *Griffith v. Ogle*, 1 Binn. 172; *Tooker v. Duke of Beaufort*, 1 Burr. 146; 2 Tidd's Practice, 932.) Generally the law does not regard fractions of a day, except in cases where the hour itself is material, as in case where priority of judgments or priority of lien and the like is in question. (*Marvin v. Marvin*, 75 N. Y. 240; *Judd v. Fulton*, 4 How. Pr. 298; *Phelan v. Douglas*, 11 How. Pr. 193; *Columbia Turnpike Road v. Haywood*, 10 Wend. 422; *Hughes v. Patton*, 12 Wend. 234; *Small v. McChesney*, 3 Cowen, 19; *Clute v. Clute*, 3 Denio, 263; *Blydenburgh v. Cotheal*, 4 N. Y. 418; *Jones v. Porter*, 6 How. Pr. 286.)

Counsel for appellant have not cited a single authority from any book, holding that for the purpose of defeating a judgment of a court of general jurisdiction the legal representative of a deceased defendant may allege that on the same day and at a previous hour before the rendition of the judgment his intestate had died, and my own researches have failed to find any authority for that position. Our views on the merits being adverse to the defendant, we have not thought it necessary to consider or decide the technical objections urged as to the form in which the questions are presented.

There being no error prejudicial to the rights of the appellant, the judgment appealed from must be affirmed.

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[Filed April 16, 1888.]

CHE GONG AND FONG LONG DICK v. L. B. STEARNS,
CIRCUIT JUDGE, FOURTH DISTRICT.

BILL OF EXCEPTIONS—TIME OF SIGNING.—There is no statute in this State fixing the time within which a circuit judge may sign a bill of exceptions.

BILL OF EXCEPTIONS—POWER OF THE CIRCUIT JUDGE.—If during the progress of a trial a party took exceptions which were reduced to writing or noted on the judge's minutes, and for any satisfactory cause he was unable to have his bill of exceptions drawn out in form and signed during the term, the judge who presided at the trial has the power to sign the same afterwards, and it becomes a part of the record with the same effect as if signed during the term.

MOGAN v. THOMPSON, 13 OR. 230.—This case, so far as it is in conflict with this opinion, is overruled.

MANDAMUS—POWER OF SUPREME COURT.—As incident to and in aid of its appellate jurisdiction, this court has the power by writ of mandamus to require a circuit judge to settle and allow a bill of exceptions.

APPEAL from Multnomah County.

Williams & Wood, and P. H. De Arcy, for Petitioners.

Rufus Mallory, and N. D. Simon, contra.

STRAHAN, J.—During the present term the plaintiffs filed their petition in this court, praying that an alternative writ of mandamus issue, directed to Hon. Loyal B. Stearns, judge of the Fourth Judicial District, requiring him to settle and sign a bill of exceptions, or to show cause why he refuses. The writ was awarded, and the return is now before the court, and will be more particularly referred to presently.

It appears from the petition and exhibits that on the thirteenth, fourteenth, and fifteenth days of December, 1887, the plaintiffs were tried for the crime of murder in the first degree in the Circuit Court of the State of Oregon, for Multnomah County, and that Hon. L. B. Stearns presided as judge at said trial; that numerous exceptions were taken by the petitioners to the rulings of said court during the progress of said trial; but that the same were not then written out and signed by said judge, and that the trial resulted in a verdict of guilty as charged in the indictment, and the petitioners were sentenced to be hanged. At the conclusion of the trial, the attorneys for the

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120	481
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30	571
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42	570
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45	515

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petitioners asked and obtained leave of court to present a bill of exceptions to the judge for his signature within ten days. No bill of exceptions appears to have been presented for the judge's signature within the time specified in the order. Thereafter other counsel appeared for petitioners, and tendered a bill of exceptions to the judge for his signature on the sixteenth day of February, 1888.

The return is in the nature of a demurrer to the writ. It does not controvert any of the facts alleged, but alleges in substance that it affirmatively appears that no bill of exceptions was prepared or tendered to said judge within the term at which the trial was had, nor within any extension of time for that purpose, and that no bill of exceptions was tendered until after the final adjournment of the court for the term, and after said judge had lost all jurisdiction or control over the matter, and was and is wholly without power or authority to settle or sign said bill.

The question as to the sufficiency of this return has been argued, and it is the only contested point before us. The question presented for determination is whether or not, in any case or under any circumstances, a circuit judge has the power to sign and allow a bill of exceptions embodying the exceptions taken and allowed during the progress, but not then written out for want of time or other sufficient cause.

1. No time is fixed by any statute in this State within which a circuit judge may sign a bill of exceptions, or denying his right to sign it after the term. Hill's Code, section 231, provides: "The point of the exception shall be particularly stated, and may be delivered in writing to the judge, or entered in his minutes, and at the time *or afterwards* be corrected until made conformable to the truth;" and section 233 provides: "The statement of the exception *when settled and allowed* shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause. . . ."

In *Ah Lep v. Gong Choy*, 13 Or. 205, this court had under consideration the question presented by this record. In that case the judgment was entered on the sixteenth day of March,

1885, and the notice of appeal was served two days thereafter. On the first day of October, 1885, the bill of exceptions was settled and allowed by the judge who presided at the trial, and on the same day was filed with the clerk. This court will notice judicially that the terms of the Circuit Court of Multnomah County are on the third Monday in January, the first Monday in May, and the first Monday in September, so that two terms of court intervened between the date of the judgment and the signing of the bill of exceptions in *Ah Lep's Case*, *supra*. In that case the language of Goldthwaite, in *Etheridge v. Hall*, 7 Port. 47, is quoted with approbation, to the effect that the court did not wish to be considered as expressing the opinion that the practice of signing bills of exceptions after the termination of the court is proper; but cases may exist in which it is necessary to pursue this course, as it is not infrequent that sufficient time is not allowed to enable a judge to examine them during the term; or counsel may be too busy to prepare them, etc. And THAYER, J., said: "I am unable to discover that the law has absolutely prescribed *any definite time* in which the exceptions shall be put in form and signed. The bill of exceptions should be tendered to the judge immediately after the trial, unless a definite time is given therefor. The nature of the affair requires this to be done, but the settlement and allowance of the statement of it may necessarily occupy a long time. In my opinion that matter should be left largely to the convenience of the trial judge." So in considering the effect of a provision in the Code of California requiring a bill of exceptions to be made within ten days after the trial, the Supreme Court of that State said: "We think that the statute directing a statement to be made within ten days, and signed by the judge in a criminal case, is directory merely. The phraseology is different from that of the practice act in reference to like provisions in civil cases, and the reason of the rule is likewise different. It would be holding the rule with great vigor to hold a prisoner absolutely precluded of his rights by the failure of the judge to settle or sign a statement within a limited time." (*People v. Woppner*, 14 Cal. 437.) And the same principle is announced in *People v. Lee*, 14 Cal. 510.

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In *People v. White*, 34 Cal. 183, the bill of exceptions was not settled and allowed until nearly a year after the trial, and the attorney-general suggested that the same should be disregarded; but the court refused to act upon this suggestion and said: "Why there was so long delay does not appear; but it is settled that the statute in relation to the time within which bills of exceptions should be tendered and settled is directory (Crim. Prac. Act, § 435), and that this court will not inquire into the reasons which induced the judge below to sign them after the time fixed by the statute, but will presume they were sufficient." A similar statute in the State of Nevada has received the same construction. (*State v. Salge*, 1 Nev. 455; *State v. Baker*, 8 Nev. 141.)

Many cases might be cited which hold that the power of the judge to sign a bill of exceptions ends with the term at which the trial was had; but a number of those cases hold that under very extraordinary circumstances the power to sign and seal a bill of exceptions may be exercised after the term. (*Herbert v. Butler*, 14 Blatchf. 357; *Whalen v. Sheridan*, 18 Blatchf. 308; *U. S. v. Breiting*, 20 How. 252; *Marye v. Strouse*, 5 Fed. Rep. 494; *Coe v. Morgan*, 13 Fed. Rep. 844; *Dredge v. Forsyth*, 2 Black, 563; *Sheldon v. Wood*, 14 How. Pr. 19; *Bottle v. Mellen*, 14 Abb. Pr. 228.) No doubt the better rule of practice is to have the bill of exceptions signed and filed during the term at which the judgment is rendered, or such further time as may be allowed by order for that purpose; but in a mere matter of practice which may be affected by circumstances that cannot be foreseen, I am unwilling to lay down an unbending inflexible rule which shall tie the hands of the circuit judges and prevent them from completing the record in cases tried before them, if not done during the term or within some time to be fixed by order. It is a power that pertains to the records of the Circuit Courts, and I think its exercise may be safely left to the sound judicial discretion of the circuit judges. In their hands it is not likely to be abused, but will be used in furtherance of justice. A party has a right of appeal, to be exercised in a civil case within six months after the judgment, and in a criminal

case within one year thereafter. If during the trial he took exceptions which were reduced to writing, or noted on the judge's minutes, and for any satisfactory cause was unable to have his bill of exceptions drawn out in form and signed during the term, there can be no doubt that the judge who presided at the trial has the power to sign the same afterwards, and it becomes a part of the record with the same effect as if signed during the term.

The misapprehension of the learned circuit judge as to his power in this matter no doubt grew out of the decisions of this court in *Holcomb v. Teal*, 4 Or. 352, and *Mogan v. Thompson*, 13 Or. 230. *Holcomb v. Teal* cannot be considered as an authority on this point, after what was said by THAYER, J., in *Ah Lep v. Gong Choy*, *supra*; and after a careful re-examination of the subject we feel constrained to say that in so far as *Mogan v. Thompson*, *supra*, is in conflict with what is here said, the same must be considered as overruled. No question is made as to the power of this court as incident to and in aid of its appellate authority, to grant the relief prayed for, further than to say that it is the remedy provided by law to enforce the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. (Hill's Code, § 593; Moses on Mandamus, 19; High on Extraordinary Legal Remedies, §§ 199, 200.) I think it proper to add that if the bill of exceptions were only to be signed because the circumstances are extraordinary and unusual, that enough is shown to entitle the petitioners to the writ. The prisoners are under sentence of death. Through some misunderstanding with their counsel they failed to have their aid in the preparation of a bill of exceptions within the time fixed by the order of the court, and without the aid of counsel, they were entirely helpless. The bill of exceptions tendered, if true, furnishes ample reason for placing this case in a condition to be heard before this court.

In addition to these facts the petitioners are imprisoned without bail; are Chinamen and unable to speak or understand the English language to any considerable extent, and had no money with which to employ counsel after the trial ended. Nor can it

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be overlooked in this connection that the circuit judge has certified that in his opinion there was probable cause for an appeal. It follows from what has been said that the return is insufficient.

Let the writ issue requiring the circuit judge to settle, sign, and allow a bill of exceptions, according to the facts as they occurred upon the trial of the petitioners before him.

[Filed April 16, 1888.]

PAULINE CLARK, PLAINTIFF AND APPELLANT, v.
CHARLES D. CLARK ET AL., DEFENDANTS AND RESPONDENTS.

AT COMMON LAW, A MARRIED WOMAN COULD NOT CONVEY HER REAL ESTATE, neither separately nor in conjunction with her husband. The effect of the marriage was to destroy her legal identity, and to confer on her husband the ownership of her personal property, the rents and profits of her real estate, and curtesy. As a result of this principle, the *corpus* of her realty was beyond the reach of either husband and wife, and it descended to her heirs until the origination of fines and recoveries, whereby, with the consent of her husband, she was enabled to alien her lands.

WHENEVER A MARRIED WOMAN WAS A PARTY TO A FINE, it was necessary that she should be examined apart from her husband to ascertain whether she *joined* in the fine of her own free will or was compelled to do it by threats and menaces. In lieu of the conveyance by fine, the less expressive and more convenient mode by deed has been substituted by statute in this country without dispensing with any of the guards designed for the protection of married women.

WHERE THE STATUTE REQUIRES THE HUSBAND TO JOIN WITH THE WIFE in the execution of a deed to convey her lands, *held*, that a joint signing, etc., of the wife's deed was a sufficient assent to comply with the requirements of the statute. His assent to the act of his wife is all that the policy of the law requires, and this is signified by a joint signing.

APPEAL from Multnomah County. Affirmed.

Kullen & Starr, for Appellant.

R. & E. B. Williams, and *Caples & Mulkey*, for Respondents.

LORD, C. J.—This is a suit in equity to declare certain deeds hereinafter mentioned void, and to require the record of them to

be canceled. The plaintiff is the widow of John C. Clark, deceased, and the mother of all the defendants except one, who is the husband of her daughter Emma A. On the seventeenth day of April, 1873, the plaintiff as party of the first part made a deed of certain realty to one T. K. Williams as party of the second part, which in the body of it is written as if it were her own individual deed, except the attestation clause, in which it is said that "the party of the first part have hereunto set their hands and seals this, the seventeenth day of April, 1873." This deed is signed and sealed by the plaintiff and her husband, John C. Clark, and her acknowledgment of the same is separately taken. Prior to the execution of said deed, the realty thereby intended to be conveyed was the property of the plaintiff in fee-simple, the interest of the husband being solely in the right of his wife. By deed of like date, the same property was conveyed by Williams and wife to the said John C. Clark, who shortly thereafter died, and through whom the defendants claim title to the property in controversy. Upon this state of facts the plaintiff contends that her deed was insufficient to convey the title to such realty, because her husband was not a party to the operative part of the deed.

The provisions of our Code regulating the conveyances of real estate of married women are to the effect that "the husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed," provided that the same be duly authenticated, and such married woman shall acknowledge, on a separate or private examination before the officer authorized to take her acknowledgment of such deed, separate and apart from her husband, and that she executed the same freely and without fear or compulsion from any one. (Hill's Code, § 3015.) At common law, a married woman could not convey her real estate neither separately nor in conjunction with her husband. The effect of the marriage was to destroy her legal identity, and to confer on her husband the ownership of the personal property, the rents and profits of her real estate, and curtesy. Her deed as a conveyance, or for any other purpose, imposed no binding obligation and was utterly void. As

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a result, the *corpus* of her realty was beyond the reach of either husband or wife, and it descended to her heirs until the invention of fines and recoveries. These were devices invented by the courts of law, by which, with the concurrence of her husband, she was enabled to alien her lands. But to give them the effect of conveyances by this method, the husband was required to join with the wife in levying a fine or suffering a common recovery. It was a solemn proceeding of record in the presence of the court, whose duty it was to ascertain if her participation in the act was voluntary and unrestrained.

A fine levied by a married woman alone, where her coverture appeared upon the record, would neither bind her nor her heirs. (2 Roper on Husband and Wife, 141; Cruise, tit. 5, ch. 5, § 12.) Yet if the wife levied a fine as a *femme sole*, and her coverture did not appear upon the record, and the fine was not avoided by the husband in his lifetime, it bound her and her heirs, upon the ground that she was estopped from averring against the record that she was a *femme covert*. (2 Roper on Husband and Wife, 141.) But it was always competent for the husband to enter and avoid the fine for the benefit of the wife and her heirs, as well as for himself. With this exception, a fine levied by a married woman without the concurrence of her husband was void, and bound neither herself nor her heirs. Whenever, therefore, a married woman was party to a fine, it was necessary that she should be examined apart from her husband to ascertain whether she *joined* in the fine of her own free will, or was compelled to do it by threats and menaces of her husband. This is significant as indicating that she must unite with her husband in levying the fine in order to convey her real estate. The disability incident to her coverture in the theory of the common law was created for her benefit and protection.

To relieve against that so as to conclude her, two things were deemed essential to enable her to convey her lands, namely: (1) The concurrence of her husband; and (2) the acknowledgment upon a private examination that the act was voluntary on her part, and uninfluenced by fear or compulsion of her husband. "For the wife," says Mr. McQueen, "is by the disabili-

ity of coverture precluded from disposing of it without her husband's concurrence. And in order to guard her against the consequences of an undue exercise of marital authority, the law will not suffer her to part with her estate till it is previously ascertained that she performs the act voluntarily." (McQueen on Husband and Wife, 27.)

In lieu of the conveyance by fine, the less expensive and more convenient mode by deed has been substituted and provided by statute in this country without dispensing with any of the guards designed for the protection of married women. By our statute, as is generally provided by the statutes of other States, the husband is required to join with the wife in the conveyance of her land, "in order," as Chancellor Kent says, "that his assent might appear upon the face of it, and show he was present to protect her from imposition." (2 Kent Com. 150.) And as a general proposition it may be stated that the deed of a married woman, unless joined by her husband, or unless authorized by statute, is void. (Martindale on Conveyances, § 25, and n.)

"If the statute in express terms," says Mr. Bishop, "requires that the husband shall be joined with the wife in the deed, her deed alone, however formal, is plainly of no effect. The immemorial usage under which this sort of conveyance has been held to be good, without the act of a statute, requires the joinder of the husband with the wife; and it is believed that, since by a principle of the common law a wife can do no valid act without the concurrence of her husband, the husband must always join to make her statutory conveyance good, unless the statute, either in express words or by necessary implication, renders such joinder unnecessary." (Bishop on Married Women, § 593; 1 Devlin on Deeds, §§ 100, 101; Tiedman on Real Property, § 794.) This indicates quite plainly that a conveyance of lands held in right of the wife must be by the deed of the husband and wife, in which they join as prescribed by statute; "for," said Sewall, J., "in a sale or grant of real estate, where the title proceeds from her, the husband and wife are as one grantor. They act together in her right, his concurrence being essential to the validity of the conveyance; and she is to be joined with him in

Opinion of the Court — Lord, C. J.

the operative words and stipulations of the conveyance." (*Lithgow v. Kavanaugh*, 9 Mass. 173.) Again it was said by Dewey, J.: "By the well-settled principles of the common law, as long held and practiced upon in this commonwealth, and subsequently confirmed by the Revised Statutes, chapter 59, section 2, a *femme covert* who owns the fee of land can convey the same only by a deed executed by herself and her husband, and when both are parties to the effective and operative part of the instrument of conveyance." (*Jewett v. Davis*, 10 Allen, 70.)

A similar decision was made in *Gray v. Mathers*, 7 Jous (N. C.) 502, in which a married woman having a life estate in land made a deed purporting to convey it in her own name, without that of her husband's being in the body, but only affixed after the signature of the wife, and it was held that such deed was void, the court saying: "It is void as being the deed of a woman laboring under the disability of coverture. The husbands are not mentioned in the deed as parties to it, and they could not become so by adding their signatures and seals to those of their respective wives." In *Blythe v. Dargin*, 68 Ala. 372, it was held that a conveyance by a married woman of lands belonging to her as her statutory separate estate, executed by her in the presence of two witnesses, and acknowledged before and certified by a justice of the peace, signed by the husband, but in which he is not named as a grantor, and which contains no words of conveyance passing or evincing an intention to pass his real estate or interest in the lands, is merely the void deed of the wife, to which the husband was not a party, and to which his concurrence was not expressed in the mode prescribed by the statute. So in *Warner v. Peck*, 11 R. I. 431, where a deed was given, drawn as the individual deed of a married woman throughout the premises, granting and covenanting parts down to the attestation clause, etc., and the deed was signed, sealed, and acknowledged by both husband and wife, the wife's acknowledgment being separately taken, it was held that the deed was a nullity, Darfee, C. J., saying: "For how can a deed which is expressed solely in the name of one person become the deed of another person by his simply affixing to it his signature

and seal? The maxim of the law is, *expressio unius, exclusio alterius*. The sole grantor named in the body of the deed is the wife. The deed was: 'I, Mary E. Huddleston, etc., in testimony whereof we have hereunto set our hands and seals.' In testimony of what? Manifestly, in testimony of the grant and covenants expressed in the body of the instrument. It is true they are null and void; but they cannot be construed as the joint grant of the husband and wife, with covenants by the husband, simply because, unless so construed, they are without effect. That would be to make for the husband and wife a deed which they had not made for themselves."

Upon analogous principles, other cases might be cited in which it has been held that a married woman, owner of the fee of land, does not pass her title by a deed executed by the husband in the granting part of the deed. (*Purcell v. Gashorn*, 17 Ohio, 105; 49 Am. Dec. 448; *Bruce v. Wood*, 1 Met. 542; 35 Am. Dec. 380; *Kerns v. Peeler*, 4 Jones [N. C.] 226.) So, too, cases might be cited in which it has been held that a wife does not release her right of dower in land conveyed by her husband, by simply signing, sealing, and acknowledging his deed, if it has no words of release. (*Powell v. Monsen*, 3 Mason, 347; *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56; *Cox v. Wells*, 7 Blackf. 410; 43 Am. Dec. 98.) Instead of the common-law mode of conveyances, our statute has substituted a deed, jointly executed by husband and wife, and acknowledged in the form prescribed, and in no other way can the wife's estate pass under our law. She has no power to convey by her own deed, and according to the reasoning of the cases cited it is indispensable that the husband be a party to the operative part of the conveyance. And Chancellor Kent says: "The weight of authority would seem to be in favor of the existence of a general rule of law that the husband must be a party to the conveyance or release of the wife." And further: "Upon the view of our American law upon the subject, we may conclude the general rule to be that the wife may convey by deed; that she must be privately examined; that the husband must show his concurrence to the wife's conveyance by becoming a party to the deed; and that the cases in

which her deed without such concurrence is valid are to be considered as exceptions to the general rule." (2 Kent Com. 152, 154.) And this result is in conformity with the impression which has prevailed with me, both upon principles of analogy and the reading of the statute, that the wife must be joined with her husband in conveying a title which proceeds from her; and that a deed made by her, although signed and sealed by him, in which he is not named or joined with her in the operative words or granting part of the instrument, is a nullity. But there is a considerable divergence of judicial opinion under like statutes as to what will constitute a sufficient assent to comply with the requirements of such statutes. It is held that a joint signing of the deed of the wife is sufficient, and that it is not necessary that the husband be joined in the body of the deed; that when he signs and seals it with her, and then acknowledges it to be his deed for the purposes contained, that such acts amount to an adoption of all which preceded his signature, and that no other legitimate cause for these acts can be assigned than a design to make all the promises to which his signature is affixed. (*Elliott v. Sleeper*, 2 N. H. 525.)

"The purpose or reason why," said Deadnik, J., "the law requires that the husband should join in the deed with his wife is, that his assent to the conveyance might appear, and that it might also appear that he was present to protect her from imposition. Why should he, upon the face of the deed, be required to say that he conveys, and is seised and possessed, and has a good right to convey, when these covenants as to lands belonging to his wife are not true? All that is required by him to signify his assent and presence is his signature. That binds him to all the recitals contained in the instrument, and makes it as much his deed or obligation as if his name was inserted in the body of it. By his signing, delivery, and acknowledgment of the deed, he would be forever estopped from setting any claim to the property conveyed." (*Friedenwald v. Mullan*, 10 Heisk. 231.) Of like import is the case of *Dentzel v. Waldie*, 30 Cal. 148, in which it was held that it was not necessary that the husband's name, as a grantor, should be

inserted in the body of a deed given by a married woman conveying her separate estate, but it is sufficient if he sign, seal, and acknowledge it. Said Sanderson, J.: "Thus the second section of the act concerning conveyances provides that a 'husband and wife may by their joint deed convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried.' What is here meant by the words 'joint deed?' Is it necessary that the husband should appear as grantor in the body of the deed, or is it sufficient if he join in signing, sealing, and acknowledging? Why make him play the part of a grantor when he has nothing to grant? His assent to the act of his wife is all that the policy of the law could require. That is well signified by a joint signing and sealing only as by making him assume in addition a false character." The principle upon which these cases rest is, that if the conveyance is made as her voluntary act, without fear or compulsion from her husband, and with his knowledge and consent, a joint signing of the deed is within the reason of the law, and a sufficient compliance with the requirements of the statute.

In *Evans v. Summerlin*, 19 Fla. 860, it is held that where the deed of a married woman, whereby she seeks to convey her separate property, contains the name of herself only as the grantee, and her husband is not named in the body of the deed, but signs the deed with her, and both duly acknowledge its execution, this is a sufficient assent and joining with her under the statute to convey the property of the wife. In *Stone v. Montgomery*, 35 Miss. 83, the court, by Handy, J., said: "The property is admitted to belong to the wife, and, of course, the husband had merely a secondary interest in it. It was her act which was essential to the conveyance; but he signed the deed and acknowledged it as his act and deed for the purposes stated in it. That was sufficient to show his consent and co-operation in the conveyance in the most certain form; and the reason of the statute in requiring the conveyance to be made by the joint deed of the husband and wife is, that it may be made with his aid and consent. His signing, delivering, and acknowledgment of the deed would estop him from setting up any claim to the

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property against the grantee, and show that the title of the wife was conveyed by his co-operation. Under such circumstances the deed is sufficient under the statute to convey the wife's estate." So in *Woodward v. Seaver*, 38 N. H. 30, it was held that a deed of the wife's lands which purports to be the conveyance of the wife alone, and contains no recital that the husband is a party, but is signed and sealed by him, is sufficient to pass the title. (See, also, *Hills v. Bearse*, 9 Allen, 406; *Schley v. Trustees etc.* 25 Fed. Rep. 890.)

Upon the principle suggested by these cases, a joint signing of the deed of the wife is held to be a sufficient assent to comply with the requirements of the statute; "for," as Graham, J., said, "although the husband's name does not appear in the body of the deed, he signed, sealed, and delivered it, and *thus joined* in its execution." (*Bray v. Clapp*, 6 New Eng. Rep. 454.)

It is thought by the court that the deed is effectual to convey the title, and the decree of the court below must be affirmed.

[Filed April 16, 1888.]

J. H. STEFFIN, APPELLANT, v. C. H. HILL ET AL.,
RESPONDENTS.

INJUNCTION.—Where, under a city charter, two modes are allowed in the improvement of the streets of the city, by one of which the cost thereof may be paid out of the general funds of the city, and by the other, may be charged to the property adjacent to the improvement, and the common counsel has caused a street to be improved, an injunction will not be granted at the suit of a resident taxpayer to restrain the city officers from paying the expenses thereof out of the general fund, without showing in his complaint that the street was proposed to be improved, and made a charge upon the property adjacent thereto.

APPEAL from Multnomah County.

Frank B. Jolly, and *E. Mendenhall*, for Appellant.

E. B. Williams, for Respondents.

THAYER, J.—This appeal is from a decree of the Circuit Court for the county of Multnomah, recovered by the respond-

ents against the appellant upon demurrer to the appellant's complaint. It appears from the transcript that the appellant commenced a suit in the said Circuit Court against the respondents, who were alleged to have been the mayor, recorder, and councilmen of the city of Albina, to restrain them from issuing a warrant on the treasurer of said city for the sum of one thousand two hundred and sixty dollars, or any sum, to one O'Neil, or any one, for the improvement of a certain street of the city known as Russell Street, for certain reasons alleged in the complaint. The only question in the case is whether the complaint is sufficient to entitle the appellant to the relief claimed. The demurrer to the complaint was upon the ground that it did not state facts sufficient to constitute a cause of suit. The first objection to the complaint is that the respondents were sued *personally*, and not in their official characters.

It seems to me that the suit should have been against the respondents in their official capacity; but that question is technical and does not go to the merits of the case. The complaint is so loosely drawn that it is difficult to ascertain therefrom the real grounds upon which the respondents are sought to be enjoined. The allegation is "that the defendants, mayor, recorder, and councilmen of said city, before the commencement of this suit, claimed to have but did not let to O'Neil a contract for the improvement of Russell Street from, etc. That said contract was not let by defendants in accordance with the provisions of section 18 of the charter of said city, or ordinance No. 9 as passed by the common council thereof on June 1, 1887, and approved by the mayor of said city on June 3, 1887."

The pleader after setting out section 2 of said ordinance, which is to the effect that the person, etc., to whom the contract is let will be required to enter into a stipulation that he will look for payment only to the fund to be assessed upon the property liable to pay for such improvement, and collected and paid into the city treasury for that purpose, and will not require the city by any legal process, or otherwise, to pay the same out of any other fund, alleged that no one was authorized by the common council of said city to advertise for bids for the improvement of said

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Russell Street; that said common council received bids contrary to notices posted up for thirty days, which set forth that said Russell Street was proposed to be improved between certain points and in a certain manner; that said common council received bids and awarded the contract for grading only on said Russell Street, and did so contrary to said notices, and to section 3 of said ordinance No. 9, and without giving any notice that it would advertise or let the same, as said O'Neil knew; nor had it ordered that the notice required by section 2 of said ordinance No. 9 should not be published; that said common council has made no effort to levy an assessment on the property adjacent to and abutting on said Russell Street for the improvement thereof; that said mayor, recorder, and common council of said city were about to and would, if not restrained by an order of the court, unlawfully and contrary to the charter of said city, and to said ordinance No. 9, issue a warrant on the treasury of said city to O'Neil for one thousand two hundred and sixty dollars, for the alleged improvement of said Russell Street.

The real grounds of the suit seem to be that the officers of the city were about to misapply its funds; and that the appellant being a resident freeholder and tax-payer of the city, would be injured in consequence. It is almost impossible, however, to determine from the complaint wherein the said officers of the city were doing, or threatening to do, any act in violation of its charter or ordinances. The common council of the city have power and authority within its corporate limits, subject to certain conditions, to grade, gravel, pave, plank, or otherwise improve and keep in repair highways, streets, and alleys. The conditions referred to are, that no property shall be assessed for the construction of such improvements for more than one half of its last county assessed valuation; that if two fifths of the property on such street and adjacent thereto shall oppose such improvement by remonstrance, then such improvement shall not be ordered; that no property shall be taxed more than once for such improvement; and that in case of proposed street improvement, where the improvement proposed is to be made at the expense of the property adjacent thereto, thirty days' notice of

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such intention shall be given by posting three notices thereof in public places of said city. (City Charter, subd. 6, § 18.)

It is obvious from the above provision, that the common council of said city is authorized to adopt either of two modes in the improvement of streets therein. It may cause the improvement to be made and pay the expense thereof out of the general fund, or it may cause it to be made and charge the cost of the improvement upon the lots and blocks fronting and abutting upon the street improved; and it is evident to my mind that the conditions annexed to the power which are above set out apply only when the latter mode is adopted. I think the last one of the conditions referred to clearly indicates that view. If such is the correct construction of the said provision of the charter, then it would be necessary that the complaint, in order to state a cause of suit, should show that the said improvement of Russell Street was made in accordance with said latter mode; for if it were made under the former mode, payment of the expense thereof out of the general fund in the city treasury would be entirely proper. That really is the only way in which it could be paid; but if the improvement in the beginning was proposed to be made at the expense of the lots and blocks fronting and abutting upon said street, and the common council had subsequently undertaken and threatened to pay it out of the general fund, there might be grounds for claiming that there was an unlawful attempt to divert the funds of the city improperly. In order, however, to make the improvement at the expense of the property adjacent thereto, thirty days' notice of such intention was required to be given by posting the three notices as before mentioned.

It was necessary that the notices express that intention, and the complaint should have shown such fact. It does show inferentially that notices were posted up thirty days, setting forth that said Russell Street was proposed to be improved, from and to certain points, and in a certain manner, but contains no allegation that the intention to make such improvement at the expense of the property adjacent thereto was expressed in said notices. For anything which appears in the complaint, the

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common council may have intended at the outset to make the expense of the improvement a general charge upon the city, which it had the right to do under the charter. Nor does the provision of the ordinance set out in the complaint prevent that body from pursuing such a course. The common council cannot curtail by ordinance its power under the charter if it were to attempt to do so. I do not think, however, that it attempted by the said provision to do that. The provision evidently only applies to the cases where the expense of the improvement is intended to be charged upon the adjacent property. If the common council, therefore, had let to O'Neil the contract for the improvement of Russell Street, it does not follow that he was required to enter into the stipulation referred to in the said provision of the ordinance. It had the right to advertise for bids, and to enter into a contract for the improvement of the street, under its power to make improvements, at the general expense of the city, which was unaffected by the city ordinance, or the conditions in the charter heretofore mentioned. Under this view of the said charter, the complaint was wholly defective, and the Circuit Court properly sustained the demurrer to it.

If I am correct in the view which I have expressed, it follows that the charter of the city of Albina leaves it discretionary with its common council to improve its streets at the general expense of the city, which, from my observation and experience, I regard as a wise provision of the statute. In all ordinary cases of the improvement of streets in a town, the property adjacent thereto should be charged with the expense thereof; but there are instances, as has been shown, in the administration of municipal affairs of other towns where such a course is impracticable and unjust. Bridges across gulches in Portland and East Portland serve as forcible illustrations of the truth of that proposition. When such an improvement is of but slight advantage to the adjacent lot owners, but highly important to the general public, the cost thereof, or at least the greater portion of it, should be paid from the general funds of the city; and city charters should be so framed as to require such a course to be pursued. Whether the said improvement of Russel Street was of the character last

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suggested, we have no means of ascertaining; but it is not shown that the common council did not have the right to make it at the general expense of the city.

The judgment appealed from will be affirmed.

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[Filed April 18, 1888.]

THE COUNTY OF UNION, APPELLANT, v. F. M.
SLOCUM, RESPONDENT.

A WRIT OF REVIEW under the Code of this State is the proper remedy to obtain a review of a judgment of a justice of the peace, rendered against the plaintiff in the writ, for the want of an answer.

SERVICES PERFORMED BY A PARTY, AT THE REQUEST OF A JUDGE OF A COUNTY, acting as a committing magistrate in taking testimony in a case of the State against another party, do not constitute a claim against the county; and a judgment rendered against the county in a Justice's Court upon such a claim, where it has not appeared and answered in the action, will be reversed upon writ of review.

APPEAL from Union County.

George G. Bingham, and *Baker, Shelton & Baker*, for Appellant.

J. D. Slater, for Respondent.

THAYER, J.—The respondent commenced an action against the appellant in the Justice's Court for the precinct of Union, in said county, to recover \$11.75.

The following is a copy of the body of the complaint: "(1) That on or about the sixth day of January, 1887, the plaintiff, at the special instance and request of one O. P. Goodell, county judge of said Union County, Oregon, acting as a committing magistrate, rendered services for defendant amounting to the sum of \$21.75 which is more specially shown by bill of items hereto attached, marked exhibit 'A,' and made a part of this complaint. (2) Thus said services were reasonably and legally worth the sum charged therefor. (3) That no part of the said sum of \$21.75 has been paid to plaintiff except the sum of \$10. (4)

Per Curiam.

That there is now due and owing from said defendant to the plaintiff the sum of \$11.75." Wherefore, etc.

"EXHIBIT 'A.'"

"Union County.....Dr.
To F. M. Slocum.

To taking testimony in the case of the *State of Oregon*
v. *Charles Herring*, 87 folios, 25 cts.....\$21.75
Contra

By amount paid.....\$10.00..... 10.00

To balance.....\$11.75"

Service of the summons was made upon the county clerk of said county of Union, together with a copy of the complaint, certified by the justice of the peace of said precinct; but the appellant made no appearance in the action as required by the summons, and judgment by default was taken against it for the amount claimed in the complaint. The appellant thereupon sued out of the said Circuit Court a writ of review to have the said judgment reviewed, alleging in the petition therefor that the said judgment was erroneous and void in that, to wit, that said complaint did not state facts sufficient to constitute a cause of action, or to give the justice jurisdiction to render the judgment against the appellant.

Upon the return of the writ to the said Circuit Court the respondent filed a motion to dismiss the cause, upon the ground that the court had no jurisdiction of it. Whereupon said Circuit Court dismissed the writ and adjudged that the defendant therein (respondent herein) recover of and from the plaintiff therein (appellant herein) the costs and disbursements of the suit.

PER CURIAM.—The writ of review was properly brought. The appellant had no other remedy by which the judgment of the justice could be reviewed, and its dismissal by the Circuit Court was error. The judgment of the justice was erroneous, the facts set forth in the complaint did not constitute any cause of action, the services of the respondent alleged therein to have been rendered created no claim against the county of Union,

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and if it had, the respondent could not have maintained an action thereon without presenting his account therefor to the County Court of said county for audit and allowance. A judgment could not properly be rendered upon such complaint in favor of a plaintiff.

The judgment appealed from will be reversed, and the case remanded to the said Circuit Court, with directions to that court to reverse the judgment of the justice, and to remand the case to the Justice's Court, with directions to dismiss the action.

[Filed April 18, 1888.]

JOHN A. TUCKER, RESPONDENT, v. WILLIAM CONSTABLE ET AL., APPELLANTS.

16	230
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17	338
17*	678
19*	13
20*	632

APPELLATE PRACTICE—FAILURE OF APPELLANT TO APPEAR OR FILE BRIEF.—In a civil case, if the appellant fail to appear in this court and files no brief, the judgment will be affirmed without any examination of the record or the assignment of errors. This court cannot perform the duty of counsel.

APPEAL from Union County.

Baker, Shelton & Baker, and *George G. Bingham*, for Respondent.

T. C. Hyde, and *R. Eakin & Bro.*, for Appellants.

STRAHAN, J.—The notice of appeal contains nineteen assignments of error; but counsel for appellant have failed to appear or file a brief in support of same. In such case the better practice is to affirm the judgment without an examination of the alleged errors, and this judgment will be affirmed for that reason. (*Kelly v. McCormick*, 28 Cal. 318; *Edmondson v. Alameda County*, 24 N. Y. 349; *Hutton v. Reed*, 25 Cal. 478; *Hickinbotham v. Monroe*, 28 Cal. 489; *Brewster v. Johnson*, 51 Cal. 222.)

In the last case cited the court say: "We decline to perform the duty of counsel by examining the record to ascertain, if

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possible, error may not have intervened in the court below." Notwithstanding this rule of practice in this particular case, we have examined the record and failed to find any error therein.

Let the judgment be affirmed.

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[Filed April 19, 1888.]

STATE OF OREGON, RESPONDENT, v. WILLIAM R. DALY, APPELLANT.

CRIMINAL LAW—INDICTMENT—EQUIVALENT WORDS.—Hill's Code, section 1173, punishes whoever shall *forcibly* ravish, etc.; and section 1740 punishes whoever "shall assault another with intent . . . to commit a *rape* upon such person." *Held*, that in an indictment under section 1740, it was sufficient to charge that the act was done *violently*, etc.

EVIDENCE—PROVINCE OF JURY TO WEIGH.—If there is any evidence upon a controverted question of fact before the jury, it is their peculiar province to determine its effect and sufficiency.

CASE IN JUDGMENT.—Where the evidence tended to prove that the appellant, who was a hack driver in the city of Portland, received the prosecutrix in his hack at a ball for the purpose of conveying her to her home in a distant part of the city, and that before reaching her destination he entered the hack without her consent and made an indecent assault upon her; *held*, that it was for the jury to determine the particular intent with which such assault was made.

APPEAL from Multnomah County.

Moreland & Masters, for Appellant.

H. E. McGinn, and *N. D. Simon*, for Respondent.

STRAHAN, J.—The defendant was indicted and convicted for an assault with intent to commit rape in Multnomah County and sentenced to imprisonment in the penitentiary for one year, from which judgment he has appealed to this court.

Upon the trial in the court below appellant's counsel asked the court to instruct the jury among other things as follows: "(1) That under the indictment the defendant could not be convicted of anything more than a simple assault. (2) That there was not testimony sufficient to convict the defendant of anything more than a simple assault." Each of these instructions was refused, to which rulings of the court proper exceptions were taken.

1. Upon the argument here, appellant's counsel claim that the first instruction asked should have been given, for the reason the indictment fails to charge the necessary facts to constitute an assault with intent to commit rape. Section 1733 of Hill's Code provides that "if any person shall carnally know any female child under the age of fourteen years, or shall *forcibly* ravish," etc., such person shall be deemed guilty of rape; and section 1740, under which the indictment is drawn, provides: "If any person shall assault another with intent to kill, rob, or to commit a rape upon such person," etc., such person, upon conviction thereof, shall be punished, etc. The indictment after charging the assault, alleges that defendant did then and there beat, wound, and ill-treat the said D. with the intent her, the said D., *violently* and against her will feloniously to ravish and carnally know, etc. In other words, the objection is that the word "forcibly" is used in the statute; the word "violently" in the indictment. It is no doubt safer for the pleader to follow and use the descriptive words of the statute in drawing an indictment for any crime, but it is not in all cases absolutely essential that he should do so. Where there is a change in phraseology, and a word not in a statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment is sufficient. (1 Wharton's Criminal Law, § 376; *State v. Wells*, 31 Conn. 210.) The word "violence" is one of the synonyms of the word "force," and so nearly of the same import and meaning that there is no room whatever for the appellant's contention on this point.

2. The other instruction to which an exception was taken impliedly assumes that there was evidence before the jury sufficient to convict him of an assault.

The legal import of the instruction was to tell the jury that under the evidence before them they might find the defendant guilty of the crime of a simple assault, but that there was no evidence before them upon which they could find the felonious intent charged in the indictment. All of the evidence given

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upon the trial is in the bill of exceptions, and we are asked by the appellant to pass upon the question whether there is any evidence in the case tending to prove the intent of the defendant in making the assault.

It is conceded if there is any evidence on that point, it is the peculiar province of the jury to weigh it and determine its effect and sufficiency. (Graham & Waterman on New Trials, 1277.) The particular intent with which the defendant acted must be determined from what he did and from the circumstances attending it. The person assaulted had intrusted herself to the defendant's care to be driven by him in his hack from a ball to her home in the city of Portland. After three other ladies who were in the hack had been driven to their homes, the defendant entered the hack where this girl, not more than sixteen years old, was alone, and there made a violent, shameless, and most indecent assault upon her, the particulars of which I do not think proper to set forth, suffice it to say he assaulted her, tore her underwear, and grossly and indecently offended her person. His conduct was forcible and violent as far as he went, and there was ample evidence before the jury from which they might infer an intent to consummate his purpose by force, if necessary. All of his conduct on that occasion pointed to such intent, and it is difficult to see how the jury could have drawn any other inference than they did. In any event there was evidence before the jury from which they might find the felonious intent, and it was their exclusive province, in such case, to judge of the effect and value of the evidence. (Hill's Code, § 845.)

We find no error in this record, and the judgment of the court below must be affirmed.

Per Curiam.

[Filed April 22, 1888.]

JOHN SCHMEER, RESPONDENT, v. ANNA SCHMEER,
APPELLANT.

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APPEAL—NEGLECT TO FILE TRANSCRIPT.—When a party perfects an appeal and then abandons it, his right of appeal is exhausted, the power over the subject is *functus officio*, and cannot be exercised the second time.

APPEAL from Multnomah County. Affirmed.

Moreland & Fenton, for Respondent.

Caples & Mulkey, for Appellant.

PER CURIAM.—Prior to the last term of this court the appellant appealed from the decree in this cause, and omitted to file the transcript in this court within the time fixed by the Code. Thereafter and during the term the respondent brought into this court copies of the decree, notice of appeal with proof of service, and the undertaking, and moved for an order of affirmance, which was allowed, of course, and the same was sent by mandate to the court below.

The appellant served another notice of appeal and gave an undertaking, and has now brought the record into this court, and upon these facts the respondent has moved to dismiss this attempted appeal. When a party perfects an appeal and then abandons it his right of appeal is exhausted, the power over the subject is *functus officio*, and cannot be exercised the second time. (*Brill v. Meek*, 20 Mo. 358.) When a party attempts to appeal but fails to observe some formality by reason of which he does not obtain the benefit of an appeal, the rule is otherwise, and he may give another notice and perfect his appeal.

The decree has already been affirmed, and cannot be questioned by this proceeding.

Let the appeal be dismissed.

Opinion of the Court—Thayer, J

[Filed April 23, 1888.]

WILLIAM COLVIG, RESPONDENT, v. COUNTY OF
KLAMATH, APPELLANT.

DISTRICT ATTORNEY—FEES OF—ALLOWANCE OF, BY CIRCUIT COURT.—It is the duty of the respective Circuit Courts at each term thereof to ascertain the fees to which the district attorney is entitled for the term, and direct an order to be entered upon the journal that the same be paid.

BAIL BOND—FORFEITURE OF—PAYMENT BY SURETIES—DISTRICT ATTORNEY—FEES FOR COLLECTING—WHEN ALLOWED.—Where a defendant in a criminal action, who had been admitted to bail, failed without sufficient excuse to appear for arraignment, and the undertaking of bail was declared forfeited, and the sureties therein consented that judgment for the amount thereof be rendered against them at the time the forfeiture was declared, and they paid the amount to the district attorney, who paid it over to the treasurer of the county entitled thereto, and filed a receipt therefor with the county clerk of the county; *held*, that it was not error for the Circuit Court in ascertaining the fees to which the district attorney was entitled for the term, to allow him ten per centum on such amount so received and paid over.

ORDER OF COURT, APPEALABLE—WHAT IS.—*Semble*, per THAYER, J.—An appeal to this court from an order in such case is not provided for in the Code. Such order is not an order affecting a substantial right, and which in effect determines an action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding after judgment or decree. (Per LORD, C. J., concurring.)

BAIL BOND—RECOGNIZANCE—WHAT IS.—Under the Code a bail bond in criminal cases is designed to serve the same purpose, and is in effect like a recognizance at common law. A recognizance is an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified. When forfeited it is made absolute, and some of the authorities indicate that it has the force and effect of a judgment.

APPEAL from Klamath County. Affirmed.

William M. Colvig, and *P. P. Prim*, for Respondent.

H. K. Hanna, and *E. B. Watson*, for Appellant.

THAYER, J.—This appeal is from an allowance for fees made by the Circuit Court for the county of Klamath, in favor of the respondent, for services as district attorney of the First Judicial District of the State, performed at the June term, 1887, of said court. It appears that the respondent, as such district attorney, attended said term of court, and at which an indictment was found by the grand jury of said county against one F. Muny, for the crime of murder in the first degree. Muny had pre-

viously been held to answer for said crime, and had given bail for his appearance at said term of court in the sum of six thousand dollars. That his arraignment was set for the fifteenth day of June, 1887, and upon his failure to appear in accordance therewith, his bail was declared forfeited to the State of Oregon, and the court adjudged that the State of Oregon have and recover of and from such sureties the said sum of six thousand dollars, and that the same be collected as by law in such case made and provided. That respondent subsequently collected from such sureties said sum of six thousand dollars, which he paid over to the county treasurer of the county of Klamath, took said treasurer's receipt therefor, and filed it with the county clerk of said county, whereupon the sureties were released from said bond, and the same was entered of record. That thereafter, and on the seventeenth day of June, 1887, the said Circuit Court, after ascertaining the amount of fees which it deemed the respondent entitled to for his services as district attorney earned at said term, allowed him, among other items, a fee of ten per cent on the said six thousand dollars so collected and paid over to said treasurer, amounting to six hundred dollars, and directed and caused an order to be entered upon the journal of the said court that the same be paid to him, which is the order appealed from herein.

The statute provides that at each term of the court it shall ascertain the fees to which the district attorney is entitled for the term, and direct an order to be entered upon the journal that the same be paid, and that upon presentation of a certified copy of such order to the proper officer of the State or county, it shall be his duty to draw his warrant upon the treasurer of the State or county for the amount, etc. (Code of 1887, § 1074.)

The county of Klamath, being affected by the order of allowance made by the Circuit Court, its counsel claims the right to appeal therefrom to this court, and insists that it is only in civil actions for the recovery of fines, penalties, and forfeitures, that such allowances can be made to the district attorney, and cites subdivision 4 of section 1073 of the Code of 1887, as proof of his proposition. The respondent's counsel contends that an

Opinion of the Court—Thayer, J.

appeal to this court will not lie in such a case; that the Circuit Court had jurisdiction of the matter, and that it will be presumed that the evidence before it justified the allowance made.

The power of the Circuit Court in that particular is derived wholly from statute. It is a similar power to that exercised by an auditing board. The legislature could doubtless have given this court jurisdiction to review decisions of the Circuit Court made in such cases; but in the absence of any provision to that effect, it certainly would have no such authority any more than we would have authority to review the action of any other auditing officer by appeal.

A writ of review, as it is termed under the Code, may be resorted to in certain cases where an appeal will not lie; but it was certainly not intended that such a writ should issue out of the Circuit Court to review its own decisions, though such a practice has been followed under similar circumstances, and maintained by able jurists. Judge Bronson always insisted that conferring a mere statutory power upon a court had the effect to render it, *pro hac vice*, a subordinate tribunal of special and limited jurisdiction; that it did not exercise the power as a court, and that a practice of allowing a *certiorari*, as a court, to remove their own proceedings as commissioners, was regular and appropriate, and showed in his dissenting opinion in *Striker v. Kelly*, 7 Hill, 9, that such practice had long prevailed; but the majority of the court in that case maintained the contrary view.

The Code of this State provides for an appeal to this court, from an order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding after judgment or decree. (Code of 1887, § 535.) This is the only provision of the statute which has any bearing upon the question, and the right to appeal in this case depends upon the construction to be given it. The order attempted to be appealed from is not an order which in effect determines any action or suit, so as to prevent a judgment or decree therein. It must, therefore, in order to be appealable, come under the head of "a final order affecting a substantial

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right, and made in a proceeding after judgment or decree." But such kind of order evidently must be one made in a proceeding in which a judgment or decree has been rendered, and affect the substantial rights of a party thereto. I do not see how any other construction of the latter clause of the provision referred to can be given. It can hardly be claimed that the decision of a matter which relates to the administrative department of the government should be regarded as such an order.

It is the practice of many of the Circuit Courts of the State to allow a counsel, appointed to defend persons charged with crime, a fee, which is chargeable to the county in which the trial is had; and if an appeal lies in this case, I do not see why it would not lie from such an allowance. The order making the allowance is in a proceeding, it is true, but it is not in a proceeding in which a judgment or decree has been rendered. We have considered the merits of the question involved in the appeal, and have concluded that the allowance of the ten per centum upon the amount of money collected by the respondent and paid over to the treasurer, under the circumstances of the case, was just and proper. The recovery of the money was not by means of a civil action, it is true, but was as effectually accomplished through the mode pursued by the respondent. The judgment entered against the sureties upon the forfeiture of their undertaking was doubtless consented to upon their part; it could not otherwise have been properly so obtained, and it is to be presumed that the respondent induced the sureties to adopt that course, through which he achieved as complete success and as beneficial a result as could have been secured by means of a civil action.

It would be very inequitable, indeed, for the county, after having received the money through the agency and management of the respondent, to avoid the payment of the per centum by means of a slight technicality. The county realized the benefit of the forfeiture in full; every dollar went immediately into its treasury, and because it was secured so promptly and apparently with so little effort on the part of the respondent, it does not follow that he is any the less entitled to his per centum than he would be if the county had been deprived of its use until the

Concurring Opinion—Lord, C. J.

end of an expensive and protracted litigation. The county had no way of collecting the money except through the respondent. He was authorized, and it was his duty as district attorney to proceed by action against the bail upon their undertaking. (Code of 1887, § 1493.) That is the only way since the adoption of the Code in which they could be proceeded against.

The remedy by *scire facias* has been superseded; but their liability was effectually established when the forfeiture was declared, and they had the right to waive the privilege of being sued in an action at law, and to confess judgment; and when they chose to adopt that course and to pay the amount of their liability, the county, which is not required to pay anything except a percentage on what it actually receives, should not, because of the strict letter of the statute, be allowed to object to the respondent's receiving his fees. Such a construction of the law would operate unjustly.

This view of the merits of the case renders it unnecessary to determine the question as to the rights to the appeal. The decision of the Circuit Court will be affirmed.

LORD, C. J., concurring.—Under the Code, a bail bond in criminal cases is designed to serve the same purpose, and is in purport and effect like a recognizance at common law. A recognizance is defined to be an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified. (2 Blackst. Com. 341; 1 Chitty Crim. Law, 90.) When forfeited it is made absolute, and some of the authorities indicate that it has the force and effect of a judgment. (4 Blackst. Com. 452.)

"A recognizance," said McKean, C. J., "is a matter of record; it is in the nature of a judgment, and the process upon it, whether a *scire facias* or summons, is for the purpose of carrying it into execution, and is rather judicial than original; it is no further to be reckoned an original suit than that the defendant has a right to plead to it; it is founded upon the recognizance, and must be considered as flowing from it and partaking of its nature;

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and when final judgment is given, the whole is to be taken as one record." (*Respublica v. Cobbett*, 3 Dall. 475.) Sutherland, J., said: "A recognizance is an acknowledgment of a debt of record; it has many of the attributes of a judgment." (*People v. Van Eps*, 4 Wend. 392.) "The recognizance being a matter of record is held to be rather of the nature of a judgment than a contract, and for this reason it is that the most usual proceeding against the cognizor for breach of condition is by *scire facias*, and it is said that an execution may issue on such *scire facias*." (*State v. Walker*, 56 N. H. 178; *Shultze v. State*, 43 Md. 306.) From all this it appears that a recognizance is considered as a judgment, being an obligation solemnly acknowledged and entered of record; and that when a default is made and a forfeiture taken, a *scire facias* may be issued upon it requiring the cognizor to show cause why the plaintiff shall not have the advantage of that record, that is, why execution shall not issue for the sum named in the recognizance.

An undertaking of bail in criminal cases under the Code is in definition and purpose a recognizance. It is an undertaking entered before a competent court or magistrate by the persons who engage as sureties for a defendant, that he will appear according to the conditions of the undertaking, or in default thereof, that they will pay a specified sum. (Code, §§ 1457, 1482.) It is thus an obligation acknowledged and entered of record, and when made absolute by forfeiture judicially declared by reason of a default, or failure to appear according to its terms, it partakes more of the nature of a judgment than a contract, and is in principle and effect the same as a recognizance at common law. Nor is there any other difference in principle, nor in the enforcement of the one or the other, only as the Code practice has abolished the remedies as technically known at common law. Instead of the writ of *scire facias*, a remedy unknown to our practice, the Code provides that the district attorney may, etc., proceed by action against the bail upon their undertaking. But in either case, whether *scire facias* is issued or an action begun, the object is for the purpose of carrying the forfeited recognizance or undertaking into execution and effect. The law makes

Concurring Opinion—Lord, C. J.

it the duty of the district attorney to prosecute for and collect all fines and forfeitures. He must prosecute for them whenever that course is essential to secure their collection. Whether he shall proceed by that method or employ some other must necessarily depend upon circumstances and be left largely to his discretion.

In the present case, when the default occurred and the forfeiture was taken, the record was put into that shape or condition, that when the term adjourned it became a matter for the exercise of his official discretion as to the course he should pursue for its enforcement and collection. The debt was solemnly acknowledged of record, which at common law was in the nature of or considered as a judgment, and which from its similarity under the Code must partake of some of its attributes. It is true an execution could not have issued for its enforcement, and yet in this incipient stage it was in the nature of a judgment and could only be satisfied of record. After reciting the facts of default, the record reads that "it was ordered and adjudged by the court that the said undertaking of the defendant is hereby forfeited, and that the State of Oregon do have and recover of and from the said sureties, etc., the said sum of six thousand dollars," etc. Considered as such, it not only represented in form, but was in the nature of a judgment on the civil side, and money collected or recovered from the sureties by the district attorney under it, and applied in satisfaction of such record, released them and entitled him to compensation for his services as much as if he had prosecuted it by action to final judgment. (*Respublica v. Cobbett, supra.*)

In this view, the objection urged is obviated, and as the equity of the case is undisputed, the judgment may be upheld.

Opinion of the Court—Strahan, J.

[Filed April 23, 1888.]

GEORGE THOMPSON, RESPONDENT, v. IRA HAWLEY,
APPELLANT.

16 251
22 301
19* 84
29*1006

SECOND APPEAL—LAW OF THE CASE.—Upon a second appeal, if the facts are the same, the former opinion is the *law of the case*, and must govern it in all of its subsequent stages.

SPECIFIC PERFORMANCE—COMPENSATION IN DAMAGES.—When the defendant inherited an equitable interest in lands, and was entitled to have his title perfected upon the payment of one hundred and sixty dollars, and then sells said lands for eighteen hundreds dollars, and agrees to *perfect the title* and refuses to do it, the purchaser may elect to specifically enforce the agreement by acquiring the defendant's equity through the decree, and have compensation in damages for the amount necessary to be paid to perfect the title.

APPEAL from Lake County.

J. J. Walton, for Appellant.

C. A. Cogswell, for Respondent.

STRAHAN, J.—The question of law upon which the rights of the parties mainly depend was settled on the former appeal. (*Thompson v. Hawley*, 14 Or. 199.) We there held that “by the terms of the contract pleaded by the defendant, he was bound to make a good and sufficient conveyance with full warranty *only* against my heirs, executors, and administrators. If this was the agreement it bound the defendant to convey such title as he had, and such conveyance must contain the covenants contained in the writing. On the other hand, if the agreement is as set out in the complaint, it can only be performed by the vendor's making and delivering a deed that shall vest the fee in the vendee. Such contract requires a conveyance that shall be good in substance, and that shall vest in the grantee a fee-simple in the land conveyed.” After the cause was remanded the pleadings were amended, but the issues made present the same questions of law, so that nothing further need be said on this branch of the case, for the reason the former opinion must govern. But the evidence has been taken in writing, and we must now consider the question of fact as to which one of the writings set out in the pleadings contains the terms of the con-

Opinion of the Court—Strahan, J.

tract made between the parties on the twenty-fifth day of June, 1880.

The plaintiff has submitted in evidence the following contract, made between himself and the defendant on that day:—

{ “SILVER LAKE, LAKE COUNTY,
OREGON, June 25, 1880.

“This will certify that I have this day sold my band of sheep, numbering (1,505) one thousand five hundred and five head of old sheep. The lambs to be counted after they get well from altering for \$1.50 per head. Also the hay ranch belonging to the estate of Lyman L. Hawley. And I hereby agree and bind myself to make the best title that I, as Lyman L. Hawley’s heir, can make, *and perfect the same* for the sum of (\$1,800) eighteen hundred dollars; the kitchen and household furniture to go with the ranch. Also, two head of milk cows with calves, one horse, two wagons, set of harness, mowing machine, hay rake and forks, and other tools belonging to the ranch; also two thousand five hundred poles that has been cut upon Rock Creek. Thompson to pay two thousand dollars down, and to have four years to pay balance; interest to be paid yearly, at the rate of ten per cent per annum.

(Signed)

“IRA HAWLEY.”

It is conceded by the defendant that this is the original writing signed by him at the time the contract was made, and as a memorandum thereof; but it is contended by the defendant he afterwards went to Lakeview and procured the writing set out in *Thompson v. Hawley, supra*, at page 204, to be prepared, signed it and delivered it to the plaintiff, and that it thereby superseded the former writing, or is to be regarded as a modification thereof.

The plaintiff gives the following account of this second writing: “After having made those notes to Mr. Hawley, he pulled a paper out of his pocket, stating that he had been down to Lakeview and got a *regular lawyer* to draw up a bond binding him to deed me that land. I said I did not look for anything now, Mr. Hawley, until after being paid in full. He said that

I had done so well by him, paying him his own price for everything, that he would just give me a *good bond* for fear that contract or paper I drew up was not binding enough on him. I said I supposed the paper I drew up was plenty good enough. I asked him what kind of a bond he had. He said you read it. I took it and glanced over it, my eyes being too bad to finish it; I handed it back to Mr. Hawley, saying: 'If you can find anything binding you to deed me that land, you show it to me.' I said further: 'I can see nothing in that paper about your perfecting the title.' He said: 'Does it not?' I said: "Not that I can find.' He said: 'I have already bound myself to do that in the one you drew up.' I then said, 'Mr. Hawley, I am not a party to this bond at all, and had nothing to do with it; it is your own get up, and you may as well keep it.' He said that he hadn't got it up himself; that he simply told his lawyer to draw up a bond for a deed, and said, if that is not a good bond giving you a perfect title, I will make you one when I have been paid in full. When he got up to leave he said: 'This paper is no good to me and I will just leave it here and you can do as you please with it, but I would not destroy it if I was in your place, for fear the other paper you drew up might get lost, so as you will have something to show if you don't destroy this.' I told him if the other paper was lost I would *rather* depend upon verbal testimony entirely, as I did not consider that paper worth the paper it was written on. I said I would not destroy it, but allow it to live as a curiosity; that is all about it."

"Question. State if you ever accepted this bond as evidence of contract between yourself and Mr. Hawley?

"Answer. Quite the contrary; I told him I held him to the paper I drew up, being it called for a perfect title. That I paid him two thousand dollars on the strength of the paper drawn up by me on the 25th of June, and I would pay him the balance of the money on that paper or contract, and I wanted him to clearly understand now, that I would not be bound by that bond in any way whatever, and asked him if he considered it any account, one way or the other. to take it with him."

Opinion of the Court—Strahan, J.

Our claim is that the defendant having claimed a modification of the contract, he must establish this by a preponderance of evidence, and as this is such an extraordinary modification, we think the evidence should be quite clear. The corroborating evidence which the plaintiff submits, as well as the facts surrounding the transaction, I think tend to support his contention and turn the scale in his favor on this question of fact. No reason is apparent why this second contract was prepared; it varies from the first writing in a very essential particular, and the plaintiff could have had no object or motive in accepting such contract. Besides several of the witnesses for the plaintiff testify to admissions and declarations of the defendant, to the effect that he was to procure the State's title before deeding the land to Thompson.

In addition to this, it does not appear probable that the plaintiff would pay eighteen hundred dollars for the mere privilege of purchasing from the State its claim to the swamp land in question. But more than this, the wagon, harness, etc., which the defendant now says he threw in to induce the plaintiff to agree to take the chances on the State's title, and to procure it himself, are all enumerated in the contract of June 25th, by which it appears that the plaintiff purchased them for the consideration therein specified. No fraud is alleged by the defendant, nor is it pretended anywhere that the agreement of June 25th was ever changed or modified by a new or other agreement. Of course the preparation and signing of another writing by the defendant, and leaving it at Mr. Thompson's, and to which he never assented, would not constitute such change or modification. I am therefore of the opinion that the writing signed by the defendant on the 25th of June contains the terms of the contract of that date respecting the land in controversy, and is the one which must be enforced in this suit.

The case then briefly stated seems to be this: That Lyman Hawley in his lifetime entered into a contract with the State of Oregon for the purchase of the land in controversy from the State, which lands are admitted to be swamp; that Lyman Hawley died, leaving the defendant, his father, as his only

Points decided.

heir at law; that the defendant entered into an agreement in writing with the plaintiff, whereby he agreed and bound himself to make the best title that he, as Lyman Hawley's heir, could make, and *perfect the same* for the sum of eighteen hundred dollars. The defendant has not yet *perfected* said title by paying his eighty per cent of the purchase money still due the State on Lyman L. Hawley's purchase; but by the agreement in question the defendant has *in equity* succeeded to all the rights and interest of Lyman L. Hawley in the land in controversy, and is entitled, if the defendant refuses to pay the balance of the purchase money which is due from the purchaser to the State, to pay the same himself, and thus acquire a perfect legal title. But to do this he must pay money which the defendant was bound to pay in order to perform his agreement. To that extent he is damaged by the default of the defendant, and for which he is entitled to compensation in this suit. (Waterman on Specific Performance, §§ 503-505.)

The proper decree will therefore be entered for the specific enforcement of the contract of June 25, 1880, mentioned in the complaint, and that the plaintiff recover of the defendant one hundred and sixty dollars, which is the balance of the purchase money due the State for the land in question, and that the respondent recover his costs and disbursements in this court.

[Filed April 30, 1888.]

NARCISSA D. GASTON, PLAINTIFF AND APPELLANT, v.
CITY OF PORTLAND, DEFENDANT AND RESPONDENT.

16	255
29	533
16	255
42	553

A DEED MAY BE DELIVERED AS AN ESCROW TO ANY PERSON OTHER THAN THE GRANTEE, and does not become a conveyance so long as it remains in that condition, or until the condition is performed upon which it is to take effect. To make the delivery conditional, it is not necessary that any express words should be used that it was delivered as an escrow to make it such; that conclusion is to be drawn from all the facts and circumstances. If at the time of the delivery the party expressly declare that he delivered it as an escrow, it obviated all question as to the intention, but that is not essential to make it an escrow.

Opinion of the Court—Lord, C. J.

Escrow.—It is not necessary that the condition upon which a deed is delivered in escrow be expressed in writing; it may rest in parol, or be partly in writing and in part oral.

APPEAL from Multnomah County. **Reversed.**

W. H. Adams, for Respondent.

J. K. Kelly, and *Whalley, Bronough & Northrup*, for Appellant.

LORD, C. J.—This was a suit in equity to enjoin the defendant from disturbing the possession of the plaintiff in a certain strip of land, which is claimed by the defendant to be a part of West Main Street, and for a decree quieting title to the same. The title of the plaintiff is not disputed, but the defendant relies on a deed of dedication, executed by the plaintiff and her husband, to the tract in dispute for public use as a street; while the plaintiff, admitting such execution, alleges that the same was made upon condition and delivered in escrow, and that such condition was never performed, and that there was no delivery. The main question to be determined is whether the *locus in quo* was dedicated by the alleged deed as a street by the plaintiff.

It appears from the evidence that several parties residing along West Main Street for various reasons were desirous of procuring its extension to King Street. To do this it would have to pass through the lands of Kamm and the plaintiff, and a strip sufficient for that purpose would either have to be bought, or condemned and paid for by the defendant. As the Kamm tract was intersected by a ravine which would have to be spanned by a bridge, or built up by filling in the requisite width, the cost of the proposed extension of such street would necessarily be heavy and involve an expensive outlay by the city. In consequence of this state of facts, it was important to secure a right of way for such street through these lands from the owners, who would be affected by the proposed extension, without cost, or by dedication by deed, in order to diminish as much as possible the expense, and to induce the city to undertake the project.

Dr. William H. Watkins, who seems to have been the active manager and representative of the residents favoring the pro-

posed extension, early discovered, by interviews and consultations with the city authorities, officially and unofficially, that the heavy expense which the undertaking involved would constitute the main objection to its success, and in order to lessen the weight of that objection, and to more favorably recommend the matter to the authorities, upon the suggestion of one of the city officials, he saw that it would be advisable to procure deeds of dedication from such owners, to be delivered upon the condition that the proposed extension of such street be authoritatively ordered and carried into effect. It needs also to be stated that the land in controversy constituted the extreme end of such proposed street extension, and unless it was opened through its entire length, and especially through Kamm's, it could be of no possible convenience or benefit to the plaintiff, but rather an actual injury and detriment. In the main, these were the facts which confronted the promoters of this street extension, and the circumstance which surrounded it at its inception. And in the light of these, it is not difficult to understand that Dr. Watkins and others, intent on securing the extension of West Main Street, should be anxious to secure a right of way across the lands of the plaintiff by dedication, in furtherance of that project, and as an inducement for the city to act in the matter. As there could be no object of the plaintiff in donating the *locus in quo* unless the street was extended, the necessity of the case, as Dr. Watkins recognized, required that he should have the deed of the plaintiff in possession, so as to be able to say, in effect, to the city authorities, that the deed is executed, and to be delivered to you upon condition that you make the proposed extension.

This is the undoubted effect of the undisputed facts, and there is much in the evidence of Dr. Watkins to confirm this view, although the circumstances to which he testified occurred more than fifteen years ago, and some of its important features had faded from his memory. He admits that he received the deed to show to the city authorities, and that the object of the deed of dedication was to induce the city to extend Main Street, and this is consistent with the idea that he held it as an escrow, and yet he says his recollection is that it was given to him to give to

Opinion of the Court—Lord, C. J.

the city authorities, although "he don't pretend to recollect any conversation about it." The truth is, as his evidence indicates, the particulars in respect to this matter had passed out of his mind, yet his own, as the other evidence clearly establishes the necessity of procuring the deed to induce the city to undertake to extend the street. Now unless the city should open the street or extend it as proposed, it had no use for the strip of land, nor the plaintiff any interest in donating it, and in such case it is more consistent with reason, good faith, and ordinary dealings to infer that the deed was deposited as an escrow, to be delivered when the defendant should cause Main Street to be extended and opened, than a present operative conveyance. But whatever doubt might arise upon the facts not disputed, which surround the initiative of such street extension, when taken in connection with some expressions in the testimony of Dr. Watkins, that doubt must disappear when considered in the light of the other evidence.

The testimony of the plaintiff is direct to the point that "the deed was given as an assurance that if they prosecuted that thing it would go through there, and failing to do that, it was no deed; it was not to be delivered to the city." Again, in stating some of the reasons, she said: "We had no access to the city, and we wanted a street through there, and it was to secure this street through Kamm's that this assurance was made that in case they gave this street to us it could go on to King Street; failing in that it was no deed." Besser, who was city councilman at the time, says that Dr. Watkins represented the parties to the deed; that the deed was not given absolutely, but upon condition that the city of Portland should open the street; that the city council never as a body accepted the deed, or directed it to be recorded, nor fulfilled the condition upon which it was to be delivered. Gaston, who is the husband of the plaintiff, testifies that the dedication deed was to take effect whenever the city of Portland within two years should open West Main Street; that the understanding with the city authorities was "that Dr. Watkins should hold the deed until the city should open the street across the Kamm tract, and when so opened, Watkins was to

deliver the deed to the city authorities"; that the city never has opened such street; and that without the proposed extension it would be of no benefit whatever to the plaintiff, but a great damage. Without further recurring to particulars, their evidence is to the effect that the deed of dedication was put into the hands of Dr. Watkins, to be held by him and delivered to the defendant when it should cause Main Street to be extended as proposed, and that such extension has not been made, or the condition performed upon which the deed was to be delivered. While the counsel for the defendant ably and industriously labored to avoid this result upon the facts, he insisted, nevertheless, that the deed when delivered to Dr. Watkins became at once operative, whether or not it was given on the condition that the city make the proposed extension, because no fit or apt words were used in delivering it; that is, because it was not expressly declared to be delivered as an "escrow." But as we shall presently show, this is not the law at the present day.

It is elementary that a delivery is essential to the execution of a deed, and until delivered it is no deed. A deed may be delivered as an escrow to any person other than the grantee, and does not become a conveyance so long as it remains in that condition, or until the condition is performed upon which it is to take effect. To make a deed an escrow it must be delivered to a stranger, to hold until the condition is performed, and then to be delivered to the grantee. (*Rayman v. Smith*, 5 Conn. 559.) Shepherd in his *Touchstone* says: "The delivery of a deed as an escrow is said to be when one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then be delivered to him to whom the deed is made to take effect as his deed." The author then proceeds to say that the form of words to be used in the delivery of the deed to one that is a stranger to it must be apt and proper, and that it must be after this manner: "I deliver this writing to you as an escrow to deliver," etc., implying at least that the word "escrow" must be used in delivering it to make the writing such. And this is the citation upon which the counsel built and pressed his argument.

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It is best answered by Abbott, C. J., in *Murray v. Stair*, 2 Barn. & C. 87, where he says: "But if the delivery itself at the time was conditional so as not to constitute any present obligation, it was an escrow or writing merely and not a deed; and the conditions of the delivery having been broken it had never become the deed of the defendant. To make the delivery conditional, it was not necessary that any express words should be used at the time. The conclusion was to be drawn from all the circumstances. It obviated all questions as to the intention of the party, if at the time of the delivery he expressly declared that he delivered it as an escrow; but that is not essential to make it an escrow." This shows, as must be applied to the case in hand, that the intention of the parties respecting a delivery is to prevail, and that it is not necessary that there should be an express declaration that it was delivered as an escrow to make it such. That if the delivery was conditional so as not to constitute a present operative conveyance, it was an escrow and not a deed. As the deed in question was not delivered to the grantee, but to a third person, the character of the delivery must depend upon the evidence.

Said Williams, C. J., in *White v. Bailey*, 14 Conn. 274: "The writer could not, it is believed, have intended to say that it could not be an escrow unless the grantee in terms declared he intended it to be such, for a great proportion of persons cannot be supposed even to know the meaning of the term; and it might as well be said that the deed could not operate as such unless the party declared it to be his act and deed, which has often been held to be unnecessary. (*Thoroughgood's Case*, 9 The Reporter [5 Coke], 137; *Holford v. Parker*, Hob. 246.) No form of words can be necessary in one case any more than in the other; and the writer must have meant that the evidence must show that the grantor intended it as an escrow, otherwise it would presume to be what it purported to be, his act and deed; for the law is well settled that a deed is delivered as an escrow when the delivery is conditional, that is, when it is delivered to third person to keep until something be done by the grantee; and it is of no force until the condition be fulfilled." (*Jackson*

Points decided.

v. *Catlin*, 2 Johns. 248, 259; 3 Am. Dec. 415; *Clark v. Gifford*, 10 Wend. 310.)

The intent of the grantor must govern, and this is to be derived from all the facts, circumstances, and proof. Nor is it necessary that the condition upon which the deed is delivered in escrow be expressed in writing; it may rest in parol, or be partly in writing and in part oral. The rule that a contract in writing *inter partes* must be deemed to contain the entire agreement or understanding has no application in such case. (*Stanton v. Miller*, 58 N. Y. 193.)

In view of all the facts and circumstances, we are satisfied from what the evidence shows was said and done at the time, and the legitimate inferences to be drawn therefrom, as well as the conduct of the parties in respect to it, and subsequently, the conveyance is without consideration and the reasons which induced it, the failure of the city to perform the conditions, and the continuous undisturbed possession of the plaintiff in the land and her acts of ownership over it, that the deed was delivered to Dr. Watkins, to be held by him and delivered to the city upon the condition it open and extend Main Street as alleged.

As a consequence the decree must be reversed, and the prayer of the plaintiff be granted, and it is so ordered.

[Filed April 30, 1888.]

JAMES POOLE, PLAINTIFF AND RESPONDENT, v. NORTH-ERN PACIFIC RAILROAD COMPANY, DEFENDANT AND APPELLANT.

FOR ITS OWN CONVENIENCE AND THAT OF THE PUBLIC, a railroad company may make reasonable rules and regulations for the management of its business, and the conduct of its passengers. It may prescribe, as a rule, and require all persons before taking passage on its passenger trains to procure tickets to enable them to ride, and in default thereof to pay an additional sum, when it has furnished proper conveniences and facilities to travelers for procuring tickets.

A COMPANY WHICH HAS PROVIDED A STATION WITHOUT A TICKET OFFICE, and at which its passenger trains stop, has not put it in the power of the traveler to comply with such rules, and such rule would be unreasonable as applied to such

Opinion of the Court—Lord, C. J.

stations, or to such traveler, when he offered to pay the usual fare. If the railroad has failed or neglected to furnish the traveler the opportunity to procure a ticket, and he applies for a passage, or enters their train without having such ticket, but offers to pay the regular fare, it cannot lawfully eject him.

APPEAL from Multnomah County. Affirmed.

Emmons & Emmons, and *C. M. Idleman*, for Respondent.

Dolph, Bellinger, Mallory & Simon, for Appellant.

LORD, C. J.—This was an action to recover damages for the unlawful expulsion of the plaintiff from the passenger cars of the defendant. After issue joined the cause was tried, and resulted in a verdict and judgment in favor of the plaintiff, from which the defendant appeals to this court.

In substance the facts certified to us are these: On the thirteenth day of August, 1885, the plaintiff entered the cars of the defendant at Holbrook Station, in Multnomah County, intending to go to Portland, a distance of thirteen miles. Holbrook Station was not a ticket office, nor could any ticket be procured at it, nor had the plaintiff any ticket. When the conductor applied to the plaintiff for his ticket he offered and handed to the conductor fifty cents, and the conductor told him that the fare when paid on board of the cars was seventy-five cents, twenty-five of which would be refunded to the plaintiff by applying to any ticket office of defendant, and presenting a rebate check which he would issue to him. The plaintiff declined to pay or make such deposit of twenty-five cents, and thereupon the conductor told him that he could not proceed on the train unless he did so. The plaintiff then told the conductor that if he was put off the train he would make the company pay for it, whereupon the conductor offered to return said fifty cents, which the plaintiff refused to accept, and the conductor then left the same on the seat where the plaintiff was sitting; that the conductor went on through the train, and afterwards returning, again demanded said twenty-five cents, and informed the plaintiff that unless he paid the same he would have to get off; that plaintiff still refused to comply with the request of the con-

ductor. When the train reached the next station the conductor compelled the plaintiff to leave the train; that after plaintiff left the cars, the conductor finding the fifty cents on the seat deposited the same for safe-keeping with the express messenger on the train.

There was no evidence of any malice on the part of the defendant, or any of its agents, or of any assault on the plaintiff, or insult offered to him, other than the fact that the conductor put his hand on the plaintiff's arm, and in a quiet and orderly manner requested him to leave the train, and the plaintiff, believing that he would be ejected by force if he longer refused, left the train. After being thus ejected from the train at Linton, the plaintiff not being able to procure a conveyance walked to Portland, a distance of eight miles, and afterwards, on the same day, met the conductor and stated that he bore no malice or resentment toward him personally, but considered that he was obeying instructions, etc. There was evidence tending to prove that the defendant had for a long time in force a rule and regulation, providing that where passengers got aboard of the defendant's cars without having procured tickets, an additional sum of twenty-five cents to the regular fare would be demanded, for which a rebate check would be issued to the passenger so entering without a ticket, which rebate check would entitle the holder upon presentation thereof at any ticket office on defendant's line to a return of said twenty-five cents, and that this rule was enforced as to all passengers getting on defendant's train without tickets.

Upon this state of facts the defendant asked the court to instruct the jury as follows: "Where a railroad company demands of a passenger getting on board its cars without a ticket a deposit of a small sum in addition to the price of the ticket, but at the same time issues to such passenger what is called a rebate check for the deposit, which entitles the holder to a return of the money so deposited by applying therefor to any ticket office of the company, this additional sum demanded on deposit required is not additional charge of fare."

The court refused to give this instruction as asked, but gave

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the same in modified form by adding as follows: "But such regulation applied to a station where passengers are received but no tickets sold or are obtainable is an unreasonable rule, and the demand for such deposit under such circumstances was an unlawful demand."

The principle stated in this modification involves the main question to be decided. There are certain duties which a railroad corporation assumes in consideration of the franchise conferred upon it by the State. It owes to the public the duty of providing suitable cars for passengers, stations and depots for taking passage, and to afford proper facilities for procuring tickets. At all stations along the line of the road at which it is usual for passenger trains to stop, the citizen has the right to enter and become a passenger by procuring a ticket or paying his fare. For its own safety and convenience and that of the public, a railroad company may make reasonable rules and regulations for the management of its business and the conduct of its passengers. It may prescribe as a rule and require all persons before taking passage on its passenger trains to procure tickets, and to exhibit them to the conductor at all proper times to entitle them to ride, and in default thereof may charge an additional sum. Such a rule may be necessary for its own protection against the fraud and dishonesty of its agents or conductors, and to avoid the inconvenience of collecting fares upon its trains in motion, while it imposes no hardship on the passenger. Necessarily such a rule and its enforcement plainly implies or assumes that the company has provided the proper facilities or opportunity for travelers to procure tickets to enable them to comply with such regulation; and when it has furnished proper conveniences and facilities to travelers for procuring tickets, the rule is reasonable and works no hardship or inconvenience. But a company which has provided a station without a ticket office at which its passenger trains stop has not put it in the power of the traveler to comply with such regulation, and it would be unreasonable to apply it to him when he tendered the usual fare.

To allow a railroad company to enforce a rule requiring pas-

sengers to procure tickets before taking passage, and in default thereof to pay an additional sum, for which a rebate check is issued, when the company has furnished no ticket office, and thus make it impossible for the traveler to procure a ticket and to comply with its rule, would be punishing the traveler for its dereliction of duty. Such a rule as applied to such a station would be unreasonable, vexatious, and oppressive. Without the necessary conveniences or facilities for procuring tickets, the traveler cannot be in fault, nor the spirit or equity of such rule violated; for such a rule is manifestly only reasonable when applied to stations where tickets may be procured. To hold otherwise would be to authorize the company to require of the passenger to do that which the company had made it impossible for him to do, and then for failing to do it to pay a penalty to the company. If it has failed or neglected to furnish the traveler the opportunity to procure a ticket, and he applies for passage or enters their passenger trains without having such ticket, but offers to pay the usual fare, the company cannot lawfully reject or eject him. The right of the company to make any rule or regulation for its own convenience, or the management of its business, which the public are bound to obey, such rule or regulation must be reasonable, and the company is bound to furnish all the conveniences, opportunity, and means necessary to comply with it. Unless it does this the rule is unreasonable.

Upon the facts as presented by this record, there was no error in the instruction as modified. Nor do we discover any error in the instruction as to damages, that is, that the plaintiff could only recover for the actual damages which he had sustained.

The judgment must be affirmed.

Per Curiam.

[Filed May 3, 1888.]

B. L. HENNESS, APPELLANT, v. MARY C. WELLS,
RESPONDENT.

APPEAL FROM A JUSTICE OF THE PEACE—FILING NOTICE—PROOF OF SERVICE.—
Section 2119 of Hill's Code requires the notice of appeal to be filed with the justice,
"with the proof of service indorsed thereon." The filing of notice without such
proof of service is ineffectual for any purpose. (*Briney v. Starr*, 6 Or. 207,
approved and followed.)

APPEAL from Polk County. Affirmed.

A. L. Frazier, for Appellant.

McCain & Hurley, for Respondent.

PER CURIAM.—This action was originally commenced before a justice of the peace in Polk County, where the defendant had a judgment in her favor. The plaintiff undertook to appeal from said judgment to the Circuit Court, but filed his notice of appeal with the justice without any proof of service being indorsed thereon. The attempted proof of service was placed on the notice at least six days after the notice was filed. Upon these facts the Circuit Court dismissed the appeal, from which judgment this appeal is taken. *Briney v. Starr*, 6 Or. 207, is decisive against the appellant.

The provisions of the Code construed in that case is in substance the same as the statute regulating appeals from Justices' Courts, and there is no reason why the latter should not receive the same construction as the former. Section 2119 of Hill's Code requires the filing of the notice of appeal with the justice, "with proof of service indorsed thereon."

The filing of such notice without the requisite proof of service indorsed is ineffectual for any purpose.

Let the judgment be affirmed.

16	266
228	468
16	266
41	480

[Filed May 7, 1888.]

16 207
27 76

A. BUSH, RESPONDENT, v. A. GEISEY, APPELLANT.

APPEAL—TRANSCRIPT—WHEN FILED.—By section 541 of the Code, the appellant is required to file with the clerk of the appellate court the transcript of the cause by the second day of the next regular term of said court after the appeal is perfected.

APPEAL—WHEN PERFECTED.—When the notice of appeal was served on the third day of January, 1888, the undertaking filed on the twelfth day of said month of January, the adverse party had five days next after the filing of the undertaking in which to object to the sufficiency of the sureties in the undertaking. No such exceptions having been filed, the appeal is to be deemed perfected on the eighteenth day of said month of January.

APPEAL—TIME IN WHICH TO FILE TRANSCRIPT—HOW ENLARGED.—By subdivision 3, section 541, the court or judge thereof may, upon notice to the respondent, enlarge the time for filing the transcript.

ENLARGEMENT OF TIME TO FILE TRANSCRIPT—NOTICE OF MOTION.—By section 524 of the Code, when notice of a motion is necessary it must be served ten days before the time appointed for the hearing, unless the court or judge prescribe a shorter time by order indorsed on the notice.

NOTICE OF MOTION—WHEN NOT NECESSARY.—Notice of a motion is not necessary except when the Code requires it, or when directed by a court or judge in pursuance thereof.

CASE IN JUDGMENT.—Where the appellant on the second day of this term of court took an *ex parte* order without notice, enlarging the time to file transcript, subject to legal objections, the time for the filing of the transcript was not thereby enlarged.

SUPREME COURT PRACTICE—ORDER WITHOUT NOTICE.—Order to enlarge time for filing transcript, when taken *ex parte* and without notice, will be disregarded where the attention of the court is called to the matter and the appeal will be dismissed.

APPEAL from Marion County.

J. A. Stratton, and George H. Burnett, for Respondent.

Ford & Kaiser, for Appellant.

STRAHAN, J.—On the sixth day of March, 1888, and within the time allowed by law to file the transcript in this case, the appellant, by his counsel, without notice to the respondent, asked and obtained an *ex parte* order allowing the appellant ten days from that date in which to file the transcript in said cause, which order was made subject to legal objections.

1. The respondent now moves the court to vacate said order, and to strike said transcript from the files. This motion is made upon notice, and has been fully argued by counsel. A

Opinion of the Court — Strahan, J.

brief reference to the provision of the Code will determine the question. By section 541 the appellant is required to file with the clerk of the appellate court the transcript of the cause by the second day of the next regular term of said court after the appeal is perfected. The notice of appeal was served on the third day of January, 1888; the undertaking was filed on the twelfth day of January, 1888. The appellant had ten days from the date of the service of the notice of appeal in which to file his undertaking, and the adverse party had five days thereafter within which to except to the sufficiency of the sureties in the undertaking. (Code, § 537, subd. 2.) Excluding the day on which the undertaking was filed, the time to except to the sufficiency of the sureties expired on the 18th of January, 1888. No such exceptions were filed, and the appeal is to be deemed perfected on that day. (Code, § 537, subd. 4.) It was therefore the appellant's duty to file his transcript by the second day of this term of court.

2. The question is therefore presented whether or not the time to file the transcript was extended by this order. Subdivision 3 of section 541 of the Code is as follows:—

“3. If the transcript is not filed with the appellate court within the time provided, the appeal is to be deemed abandoned and the effect thereof terminates; but the court or judge thereof *may, upon notice to the respondent*, and such terms as may be just, by order, enlarge the time for filing the same; but such order shall be made within the time allowed to file the transcript, and shall not extend it beyond the term of the appellate court next following the appeal.”

Section 524 of the Code provides: “When notice of a motion is necessary it shall be served ten days before the time appointed for the hearing; but the court or judge thereof may prescribe by order indorsed on the notice a shorter time. Notice of a motion is not necessary, except when this Code requires it, or when directed by a court or judge in pursuance thereof.” By section 522 of the Code, every direction of a court or judge made or entered in writing, and not included in a judgment or decree, is an order, and an application for an order is a motion.

Points decided.

It is manifest from these provisions of the Code that this was a case where notice of a motion was necessary by the express requirement of the law, and it appearing that no notice whatever was given, the time for filing the transcript was not enlarged. The appellant took his order without such notice at his peril, and now that his right to proceed without notice is questioned, the court has no jurisdiction whatever in the matter.

The appellant should have seen to it that the necessary notice was given or waived, and papers filed before taking his order. A practice seems to have prevailed for a long time in this court to take such orders *ex parte* and without notice; but it is within the knowledge of the writer that whenever an appellant's right to do so has been questioned, and the matter brought to the attention of the court that notice had not been given, the appeal has been dismissed. I can find no reported case on the subject, but such has been the practice.

In accordance with this practice the motion will be treated as a motion to dismiss the appeal, and allowed.

[Filed May 7, 1888.]

JESSE SOVERN, APPELLANT, v. S. M. YORAN,
RESPONDENT.

18	208
44	108
44	118
44	584

AT COMMON LAW THE FINDER OF LOST PROPERTY has a valid claim to the same against all the world except the true owner, and he was bound to hold it for the owner, and was liable for misdelivery; but the provisions of our statute as to lost property has modified this rule.

WHERE MONEY WAS FOUND HID IN THE EARTH AND THE SURROUNDINGS, evidence that it was intentionally deposited in the place found for safe-keeping, but the defendant not knowing to whom it belonged, and there being no marks on it or other indication by which the owner could be known, and the defendant treated it as subject to the provisions of such statute, *held*, that such money was not lost money, and not subject to distribution according to such statute.

MONEY OR GOODS THAT ARE LOST are the only kind that can be said to be found. It is property that the owner has involuntarily parted with, and not property that he has intentionally concealed in the earth for safe-keeping. It is not the purpose of our statute to treat money or goods hidden and found as lost property, when the owner is unknown, but the statute is intended to apply only to what may be properly denominated lost property. As the effect of the statute is to innovate the common-law rule in destroying the title of the owner of lost property after the lapse of a certain period, upon compliance with its provisions,

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held, that it ought not by construction or otherwise to be extended to cases which do not come plainly within its purview, or other than those upon which the facts may be properly considered lost property.

MONEY OR GOODS WHEN FOUND, ALTHOUGH THE OWNER IS UNKNOWN, which has been hidden in the earth by the owner for safe-keeping, cannot be considered as property of which he has casually or involuntarily parted with the possession, or lost property to which the statute applies, and in such case if the finder undertakes to deal with it as lost property, his acts thereby will not impair or divest the title of the owner, or his representatives, or defeat their right to their recovery. Where the defendant, after having pursued the mode prescribed by the statute for lost property, to discover the true owner of money which had been found concealed in the earth under the floor of the barn for safe-keeping, and such means failed to ascertain to whom such money belonged, and there being no marks on it to indicate its ownership, upon the assumption that the statute applied, and that the finders would be liable to suit unless distributed according to its provisions, delivered it as therein prescribed. Held, that in doing this the defendant asserted no right or title of himself to the property, or dominion over it, or assumed the right to dispose of the property by virtue of any claim of title over it, but that he acted in good faith, upon the mistaken assumption that the law required him to do what was done, and was therefore not liable for conversion.

APPEAL from Lane County.

J. K. Weatherford, and L. Bilyeu, for Appellant.

G. B. Dorris, and H. Y. Thompson, for Respondent.

Trover by Sovern, as administrator of Johanna Goodchild, deceased, against defendant, for two packages of money alleged to have been the property of said decedent, and to have been converted by defendant. The defendant denied the material allegations of the complaint, and set up as a further defense the following: That on the twenty-second day of March, 1884, upon the premises owned and occupied by defendant, one Hugh Gray found a package of money containing the sum of \$926.85, and one Darwin E. Yoran (defendant's son), found a package of money containing the sum of \$1,000. That the said Gray and Yoran delivered the said two packages of money to defendant to be disposed of according to law, and subject to their claims as finders. That defendant in compliance with the statute concerning lost property, on the twenty-fourth day of March, 1884, gave notice in writing to the clerk of Lane County of such finding, and also on said day caused similar notices to be posted in two public places in said county as follows: One at the court house and one at the postoffice in Eugene City, and that defend-

Statement of the Case.

ant caused a similar notice to be printed in the Oregon State Journal, a newspaper published weekly in said county, for the time prescribed in said statute. That no owner or claimant of such money appeared within one year from the date of said notice. That thereafter, on the twenty-fifth day of March, 1885, and before any notice was given to defendant of any claim to said money, and before the commencement of this action, defendant, in compliance with the aforesaid statute, delivered to the county treasurer of said county, one half of the value of said two packages of money, less the expenses, and delivered to said Gray and Yoran, the other one half of said money in the respective proportions to which each would be entitled under said statute. That said sums were delivered to defendant, and dealt with by him as aforesaid, solely as the bailee of said finders, Gray and Yoran. By way of reply, plaintiff alleged that decedent had in her lifetime placed the said packages of money for safe-keeping in the places where they had been found, and that she owned or was in the lawful possession of said premises at that time, and that therefore the money was never at any time lost, within the meaning of the statute.

On the trial it appeared that the premises mentioned had been purchased by defendant from plaintiff as administrator, at a sale of decedent's property. Plaintiff also proved that the decedent at the time of her death occupied these premises, and was accustomed to secrete money thereabouts; that she had money corresponding with the amount found, but that its whereabouts had never been discovered; that at the time of her death she attempted to tell her daughter something about money, and indicated that it was secreted, but was too weak to state intelligently regarding it. The circumstances of the finding of the property, as detailed by the witnesses, are stated in the opinion.

On a former trial, upon the pleadings and this evidence, a nonsuit was granted, but upon an appeal the judgment was reversed, the court in that opinion (15 Or. 644) holding that the evidence should have been submitted to the jury. Upon the second trial in the lower court, the jury found that the decedent was the owner of the money, but also found that there had been no conversion by the defendant, and rendered a verdict in his favor. From the judgment thereon the plaintiff appeals.

Opinion of the Court—Lord, C. J.

LORD, C. J.—This was an action of trover, brought by the plaintiff as administrator against the defendant, for the conversion of two certain packages of money, alleged to have been the property of the deceased. After denying the facts thus alleged, the defendant set up as a defense in substance these facts: That at the time alleged, upon the premises owned and occupied by the defendant, one Hugh Gray and one Darwin E. Yoran each found a purse of money, and that they delivered said packages to the defendant to be disposed of according to law, and subject to their claim as such finders; that the defendant as such holder of the money, in compliance with the statutes in such case, did give the required notice to the clerk of the county by posting in two public places, and by publication in the Oregon State Journal, etc.; that no owners appeared within one year from the date of said notice and claimed said sums of money, and that before any notice was given to the defendant of any claim to the same, and before the commencement of this action, in compliance with the statutes aforesaid, did deliver to the county treasurer one half of said money, and to the said Gray and Yoran the other half; that said sums of money were delivered to the defendant as bailee of said finders, and that he delivered that portion to which each was entitled, and paid over to the treasurer the respective sums as aforesaid, etc.

In the way of new matter, the reply alleged that the deceased in her lifetime placed the said purses in the places mentioned for safe-keeping, and that she owned or was lawfully in possession of said premises at said time, and that said money was never at any time lost. By the evidence in the bill of exceptions, it appears that the money in controversy was found in two cans under the floor in the barn, and that the finders were two boys, who thus substantially describe the circumstances of the finding.

One of them testifies: "There was one plank that was not nailed down, and had a small hole in it as though the rats had gnawed it; it was about two feet long; when that piece of flooring was lifted up, Hugh Gray found the can of money. We counted it, and there was \$925.85 in gold and silver; afterwards I found another can about a half foot from the one Hugh Gray found; seemed to be a yeast powder can; it was about five

inches long, and had in it \$1,000 in gold coin. I took the money to my father and handed it to him." After inquiring of the boys where they had found the money, etc., the defendant testified: "I took it and brought it to the county treasurer, and related to him the circumstances, and he placed it in his safe; then I returned home." And in describing the place of the finding said: "I found that a plank had been sawed into diagonally to form a miter so it would not drop through, and a little pit had been dug six or eight inches deep, and that it had been filled with chaff and hay feed in the manger in which the cans had been placed. I then brought the money to the treasurer's safe and deposited it, and on Monday following gave the notices," etc.

The court instructed the jury, among other things, that "if the defendant was proceeding honestly under the supposition that the money was lost property, it would not of itself constitute conversion, although he was mistaken about the facts of the money being lost, and in his attempt to proceed in reference to the law of lost money," to which the plaintiff excepted.

After retiring to consider their verdict, the jury returned with this result: To the question: "Was Johanna Goodchild at the time of her death the owner of the property described in the complaint in this action?" Answer. "Yes." To the question: "Was there any conversion of the money in question by the defendant?" Answer. "No;" and also returned a verdict in favor of the defendant. From this statement it is sufficient to say that the contention of counsel for the plaintiff was that the answer of the defendant, and the evidence offered by him, establishes in law conversion, and that the court should have instructed the jury to that effect, and not as above stated. They proceed upon the hypothesis that the money was not lost, but intentionally deposited in the place mentioned for safe-keeping, and that the admitted acts of the defendant in relation thereto were inconsistent with the rights of the true owner, and in law constituted a conversion.

Ever since the decision of Lord Chief Justice Pratt, in *Armory v. Delamater*, 1 Strange, 504, it seems to be settled law that the finder of lost money has a valid claim to the same against all the world, except the true owner, and generally it may be said

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that the place in which it is found creates no exception to this rule. "But property," said Trunkay, J., "is not lost in the sense of this rule if it was intentionally laid on a table, counter, or other place by the owner, who forgets to take it away, and in such case, the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place the finder has no right of possession against the owner of the building." (*Hamaker v. Blanchard*, 90 Pa. St. 379.) Strictly speaking, it may be said that before a thing can be found it must have been lost; and property which the owner has simply or intentionally laid down, or deposited in some place, and for the time forgotten where it was left or put, in legal intendment can hardly be considered as lost. "The loss of goods in legal and common intendment," said Rees, J., "depends upon something more than knowledge or ignorance, the memory or want of memory, of the owner as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed chamber, or upon a table or bureau, I may leave them behind me indeed, but if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put anything carefully and voluntarily in the place you intend, and then forget it; it is casually and involuntarily to part from the possession, and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there." (*Lawrence v. State*, 1 Humph. 229.)

The distinction to be noted is between the cases in which the thing or property is actually lost, and those in which it is intentionally left or deposited in its place; cases in which, as Baron Parke said, "the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict." Upon the theory that the case in hand is parallel in principle with the class last named, it may be argued that the defendant, being the owner of the property in which the money was deposited, was entitled to the possession as against the finders, and their delivery to him did not make him in law bailee for them, but

required him, as was said in *McAvoy v. Medina*, 11 Allen, 584, "to use reasonable care for the safe-keeping of the same until the owner shall call for it," and that when he undertook to treat it as lost property, and actually delivered one half of the money to the county treasurer and the other half to the finders, he acted in derogation of the rights of the true owner by the exercise of dominion over it, which rendered him answerable in trover for conversion.

At common law, the finder of lost property was bound to hold it for the true owner, and was liable for misdelivery. In *Isaacs v. Clark*, 2 Bulst. 306, Lord Coke says: "When a man doth find goods, it hath been said, and so commonly held, that if he doth dispossess himself of them by this, he shall be discharged; but this is not so, as appears by 12 E., 4th vol., 13, for he which finds goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election whether he will take them or not into his custody, but when he hath them one only hath the right unto them, and therefore he ought to keep them safely; if a man, therefore, which finds goods, if he be wise, he will then search out the right owner of them and so deliver them unto him; if the owner comes unto him and demands them, and he answers him that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them, this refusal is no conversion, if he do keep them for him."

The duty of the finder to ascertain who is the true owner before he makes a delivery, and his liability in case of misdelivery, is here clearly stated. But our statute, as we shall presently see, has innovated this rule, and the finder, after doing the things prescribed for the purpose of ascertaining the true owner, is required after the expiration of a year to turn over one half to the county, and entitled to keep the other half of such lost property; and in case of neglect or failure to do so, the county may bring an action against such finder to recover the same. So that if the owner should afterwards appear, such acts upon the part of the finder, done in pursuance of law, would not render him liable for conversion. Nor at common law, "if the

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owner comes unto him and demands them," and he does not know him, and for this reason refuses to deliver such lost property to him, is his refusal a conversion? In such case, acting in good faith and with fairness, his mistake cannot be urged against him, and will not render him liable in trover.

In some important particulars, the facts of the case in hand are more akin to what is known as treasure trove. That is, "where any money is found hid in the earth, but not lying on the ground, and no man knows to whom it belongs." Now, the surrounding facts indicate that the money was intentionally deposited in the place where found for concealment. Until after the money was distributed as stated, the owner was unknown. So that during the possession of the defendant there was present all the elements constituting treasure trove. There was the hiding, the secrecy, that unknown owner, in fact, dead owner and unknown representatives. It is only when the owner appears or is shown that the title of the king vanishes as heir to him who was presumed to be dead; in a word, when the owner is made known, it ceases to be treasure trove. But while that fact lies hid, while the case stands of money found hid in the earth, and the owner unknown, after diligent search, and the finder treats the property as treasure trove, and then afterwards the owner appears, the only effect is to destroy the character of such property as treasure trove, and thus defeat the title of the king or sovereign; but it does not render the finder liable for conversion. His mistake, if such it may be called, like the refusal of the finder to deliver on demand lost property when the owner is unknown to him, is no conversion, for he is justified in his conduct at the time, in treating it as treasure trove by the presence of all the elements which constitute it such.

The record shows that the defendant bought the property at an administrator's sale and entered into possession, and while thus in possession, the boys found the money in the manner and under the circumstances already stated. It was delivered by them to the defendant as their agent or bailee for the purpose of ascertaining its owner. Neither he nor they knew who the owner was, nor was there any marks on the money or otherwise

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by which the owner could be known. What was the defendant to do? Here was money evidently deposited for concealment found upon his premises, and the owner of it unknown. Our statute provides that "if any person shall find any money, etc., and if the owner thereof is unknown, such person shall, within five days after finding such, give notice thereof in writing to the county clerk, and also cause a notice thereof to be posted in two public places," etc. And if the amount found exceed fifteen dollars he "shall, in addition to the preceding requirements, within fifteen days, etc., cause notice thereof to be published in a newspaper printed in the county, etc., and if no person shall appear to claim the same, etc., within two months, he shall procure the appraisal thereof by a justice of the peace," etc.; and further, "if the owner of such lost money, etc., appear within one year after notice given, etc., and make out his right thereto, he shall have restitution, etc.; but if such owner shall not appear within one year, then the finder shall pay one half, after deducting all legal charges, to the treasurer of the county, etc., and in case of neglect to do so on demand, 'after the expiration of the year,' the same may be sued for by the county." (Code, §§ 3708, 3709, 3710.)

The defendant not knowing to whom the money belonged, and there being no marks or other *indicia* by which the owner could be ascertained, treated the money as subject to the provisions of this statute. The language of the first section is that "if any person shall find any money or goods, and if the owner of it be unknown, such person shall," etc. This seems to have been interpreted to mean that when money or goods is found and the owner of it is unknown, it applies as well to money or goods hidden in the earth which had been found and whose owner was unknown as to lost property. Taking this section alone, it might be argued that the intent is to treat property hidden and found as lost property when the owner is unknown, or to put them on the same footing. In a word, that it contemplates that he who "finds" must necessarily have had no knowledge of the existence of such money or goods until found, and the owner of which is unknown, and that as to such person, whether the money or goods be lost or hidden, it occupies the same relation

as to him, and could not have come into his possession except by finding, and consequently, money or goods when found may include money or goods hidden in the earth or lost upon it, and in either case, if the owner be unknown, the section cited is broad enough to cover either case.

In this view, if money be hidden in the earth for safe-keeping, unless the owner puts some marks or other *indicia* upon it by which he may be identified or made known, the finder would be justified in treating it as lost property. But this construction is hardly tenable, for strictly speaking, it is only money or goods which have been lost that can be said to be found, and the succeeding provisions of the statute make it plain and beyond all doubt that the statute was only intended to apply to lost money or goods, which as we have seen is property that the owner has casually or involuntarily parted with, and not property which the surroundings evidence that the owner deposited intentionally in the place where found for safe-keeping. As the effect of this statute is to innovate the common-law rule in destroying the title of the owner of lost property after a certain period upon compliance with its provisions, it certainly ought not, by construction or otherwise, to be extended to cases which do not plainly come within its purview, or other than those which upon the facts are properly denominated lost property. Money or goods, therefore, when found, although the owner is unknown, which has been hidden in the earth by him for safe-keeping, is not property of which he has involuntarily parted with the possession, or lost property, to which the statute applies; and in such case, if the finder undertakes to treat or deal with it as lost property his acts thereby will not impair the title of the true owner or defeat his right to recover it. But did the act of the defendant in thus treating the money constitute conversion?

It must be admitted that prior to the distribution of the money according to the statute, all the acts of the defendant by advertisement and otherwise were done, not in derogation of the rights of the owner, but to ascertain who was such owner, and for the purpose of satisfactory proof of delivering his property to him. As these means failed to ascertain to whom the

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money belonged, and there being no clue by any marks to its ownership, upon the assumption that the statute governed in the premises, and that the finders would be liable to suit unless distributed according to its provisions, the defendant for them delivered one half to the county and the other half to the finders. In doing this he asserted no right or title of himself or them to the money, nor any as against the owner or his representatives who were unknown; but he acted in good faith, upon the mistaken assumption that the law required him or those for whom he acted to do what was done. The defendant did not assume the right to dispose of the property, nor to assert any dominion over it by virtue of any claim of title of his own or the finders, and consequently there was no conversion nor any prejudice to the rights of the plaintiff by the instruction complained of.

The judgment must be affirmed.

[Filed May 8, 1888.]

THOMAS J. MOUNTAIN, RESPONDENT, v. MULTNOMAH COUNTY, APPELLANT.

BRIBERY—REWARD FOR CONVICTION OF.—The County Court for the county of Multnomah, at the May term thereof, 1886, made an order that a reward of two hundred and fifty dollars be offered for information leading to the conviction of any person who might be guilty of bribery at the coming election in June. M. claimed that he gave information which led to the conviction of W. and C. in the United States court, district of Oregon, for bribing P. at said election, and demanded five hundred dollars reward. *Held*, that the County Court had no authority to make such order. *Quære*, whether the respondent's petition to the County Court contained sufficient facts to entitle him to the reward claimed, even if the offer had been legal; whether the County Court did not intend by the offer of the reward a conviction in the courts of the State for a violation of its statutes; and whether a conviction in a United States court for the violation of any act of Congress would be a compliance with the terms of the offer.

APPEAL from a judgment of the Circuit Court for the county of Multnomah.

Stott, Waldo, Smith, Stott & Boise, for Respondent.

McGinn & Simon, for Appellant

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THAYER, J. — This case arises out of the following facts: On the sixth day of May, 1886, the County Court of Multnomah County made and entered of record an order to the following effect: "At this time it is ordered by the court that a reward of two hundred and fifty dollars be offered for information leading to the conviction of any person who may be guilty of bribery at the coming election in June."

On the ninth day of December, 1886, Thomas J. Mountain, the respondent, filed in said court a petition setting forth the above offer of reward, and praying said court for an order directing payment to him of the sum of five hundred dollars, alleging as a reason therefor that he did, on the day of the general election held on the first Monday in June, 1886, arrest one Herman Wise and one Julius Centner, for the crime of unlawfully bribing one William H. Pearson to vote at said election; and further alleging that he had on June 10, 1886, complained before Paul R. Deady, United States commissioner, of said Wise and said Centner, and furnished such information and proof before said commissioner that said Wise and said Centner were each held to appear before the grand jury, thereafter to be empaneled in the Circuit Court of the United States for the district of Oregon. And further, that he duly appeared before said grand jury, and furnished such information and proof before the same that said Wise and said Centner were each duly indicted for bribery committed in bribing said William H. Pearson unlawfully to vote at said election; that on the 8th of December, 1886, said Wise and said Centner each duly pleaded guilty to said crime as charged in said indictment, and were sentenced.

The petition further alleged that the information furnished by said Mountain solely led to the prosecution and conviction. That on the sixth day of January, 1887, the County Court of said Multnomah County made an order allowing the sum of two hundred and fifty dollars to the said respondent or his assignee for the services performed, as alleged in his petition, upon said respondent, or his assignee, giving a bond in the sum of five hundred dollars, conditioned for the payment to Multnomah

County, Oregon, of said sum of two hundred and fifty dollars, or so much thereof as shall hereafter be made to appear that said county shall be compelled to pay any other person. The said respondent thereupon sued out of the said Circuit Court a writ of review to the said County Court to have the said order reviewed, whereupon the said Circuit Court adjudged and determined that the same be reversed, and that the said Mountain be allowed the sum of five hundred dollars on account of his said claim, and by an order thereon made directed the said County Court to make such allowance, and issue to him a warrant upon the treasurer of the county for the payment of that sum, from which adjudication the appeal herein is taken.

Persons competent to contract may ordinarily offer a reward and render themselves liable for its payment, and for the purpose of encouraging the apprehension of certain felons, rewards have been provided for by statute. (Jacob's Law Dict. tit. Rewards.) The legislature of the State has power, no doubt, to enact a law bestowing compensation upon parties who will furnish information leading to a conviction of persons guilty of bribery at elections. Whether such a law would be a wise regulation or not is left to legislative discretion.

The order of the County Court that the reward be offered must be regarded as a promise to compensate parties for the performance of the services therein referred to. It must be considered in the nature of a contract between the county and those who accepted of its terms and acted upon them. Whether the county had authority to enter into any such contract is made a question, and must be determined at the threshold of the case. Counties are involuntary *quasi* corporations. They are created primarily to aid in the administration of civil government. They are agencies through which a large proportion of the affairs of government are conducted. They possess certain powers of a private character, such as the purchasing, holding, and controlling property necessary to carry out the objects and purposes for which they are organized. So far they have powers common to those of a private corporation; can enter into contracts, sue and be sued. But the main powers exercised by

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means of county organizations are of a public character, consisting of functions and duties imposed upon their officers, which the latter are required to discharge. Those powers, however, are in no sense corporate functions or duties; they belong to the general judicial and administrative authority of the State. That a county in its strict corporate capacity is capable of entering into any such contract as the one in question cannot be maintained for a moment. In that respect they have no more power than a school district, and are less affected by bribery and illegal voting at general elections than a school district would be by such practices if indulged in at school district meetings. If the authority, therefore, to offer a reward in such cases can be rightfully exercised by county officials, it must be included in the powers conferred upon them for general public purposes. The legislature could probably invest a county organization with such authority, but it is a substantive power and would require an express provision to confer it.

There is nothing in the general laws indicating an intention to confer any such power upon the county courts of the various counties of the State; nor which shows that the legislature would approve of any such policy. The county courts, in the management of county affairs, have no power except that which is expressly given them by statute, or which is necessary to carry out those so given them. They have no authority to legislate. Their province is to administer the law as the legislature has directed. I cannot see how it can be maintained upon principle that the County Court possessed any such authority as that claimed for it in this case, and the briefs of the counsel show very decidedly that it is not sustained by precedent. It appears to me that the County Court of Multnomah County could as well have ordered that a reward be offered to detect offenders of the law in any other case as in that of bribery at elections. A wholesale proceeding of that character would absorb all the revenues of the county. It might tend to the suppression of crime, and to promote morality; but it is very important that the various organs and branches of the government confine their administration of affairs to the discharge of

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those duties committed to them respectively. Any other course would necessarily create confusion, and upon the whole, occasion more injury than accomplish good.

This view of the case renders it unnecessary to consider other questions involved therein. We deem it proper, however, to state that there is great doubt as to whether the respondent's petition was sufficient to entitle him to the reward claimed. It is very questionable whether proof of the conviction of the parties for the bribery in the United States court was such a conviction as was contemplated in the offer of the reward. The query is: Did not the County Court intend by the offer of the reward a conviction in the courts of the State for a violation of its statutes, and not a conviction in a United States court for the violation of an act of Congress?

The first point considered, however, is decisive of the case. The judgment appealed from will be reversed, and the cause remanded to the Circuit Court, with directions to dismiss the writ.

[Filed May 8, 1888.]

G. R. CHRISMAN, RESPONDENT, v. THE STATE
INSURANCE COMPANY, APPELLANT.

FIRE INSURANCE—INTEREST OF INSURED.—The insured must have an insurable interest in the property both at the time the insurance is effected and at the time of the loss.

PLEADINGS—PLAINTIFF'S INTEREST IN PROPERTY INSURED.—The plaintiff's interest in the property insured being one of the essential facts upon which his right of recovery depends, in an action founded on a policy against damage by fire, such interest must be alleged in the complaint.

POLICY—INTEREST OF THIRD PARTY.—Where a policy is issued to one party and assigned to another, who has succeeded to the interest in the property covered by the policy, and in consenting to such assignment the company agrees that the "loss, if any, shall be payable to C., mortgagee, as his interest may appear," in an action on the policy by C.; *held*, that the action might be sustained in his name, but the complaint must make his interest *appear*.

APPLICATION—POLICY.—Where an application for insurance is referred to in the policy as the basis of the contract, and it is agreed that it shall be deemed and taken as a part of the policy and as a warranty on the part of the assured, both the application and policy are to be construed together as one entire contract.

16 283
20 550
18* 466
28* 841

16 283
d26 189
d26 442
18* 466
37* 713
39* 621
18 283
34 312
16 283
142 562

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POLICY—TERMS OF.—The statement in a policy which makes an application a part of it, and which contains various warranties on the part of the assured, the further statement therein that any false or untrue answers or statements material to the hazard of the risk shall render this policy void does not defeat, qualify, or limit the express warranties contained in the policy.

APPLICATION—FAILURE TO ANSWER QUESTIONS TRULY OR TO MAKE KNOWN EXPOSURES.—Where the applicant agrees in his application that if it does not truly answer the following interrogatories, and correctly describe, state, and make known the proper value, the title, the location, the *exposures*, the occupancy, the liens and encumbrances thereon, then the said policy should be void. The answers made by the assured to the questions are express warranties, and if they are untrue no recovery can be had upon the policy.

CONTRACT—CONSTRUCTION.—In construing a written contract it is the duty of the court to so construe it, if possible, that every word shall have its appropriate and proper force and effect, and in such manner that no part of it shall be ineffectual.

WARRANTY—REPRESENTATION.—The distinction between a warranty and a representation is that a warranty must be true, while a representation must be true only so far as it is material to the risk, and it is material when a knowledge of the truth would have induced the insurers to have refused the risk or to have charged a higher rate of premium.

APPEAL from Lane County. **Reversed.**

R. Williams, for Appellant.

George W. Washburne, and *L. Bilyeu*, for Respondent.

STRAHAN, J.—This is an action against the defendant corporation on a policy of insurance issued to one George H. Stansbury, insuring him against loss by fire, which policy covered a dwelling-house, granary, and barn, of which the insured was then the owner; and it is alleged that said buildings were totally destroyed by fire on the thirtieth day of October, 1886, and that the loss had been adjusted at \$1,616.30, and had not been paid. It is also alleged that after said policy was issued the said George H. Stansbury sold and duly conveyed the buildings thereon insured to John A. Lawrence, and at the same time assigned and delivered to said Lawrence said policy, with the written consent of the defendant indorsed thereon. Proof of the loss is also alleged, and that plaintiff is the owner and holder of said policy as appears by said exhibit "A," which is a copy of the policy.

The answer contains a denial of most of the material allegations of the complaint, but the issuance of the policy to Stansbury is admitted. The answer then alleges, by way of a further

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and separate defense, that the policy of insurance in the complaint mentioned was issued and delivered upon the written application of G. H. Stansbury. That said application contained, among other things, the following provisions, questions, and answers, to wit:—

“The applicant agrees that all valuations are made by the said applicant, and that the company is not to pay in case of loss to exceed three fourths of the actual cash value of any building; that if this application does not truly answer the following interrogatories, and correctly describe, state, and make known the property value, the title, the location, the exposures, the occupancy, the liens and encumbrances thereon, or if any misrepresentations or omissions to make known any and all facts material to the risk herein, then the said policy shall, in either event, be null and void.”

“Question 22. Are there any buildings, railroads, tracts, or exposures (except wood-shed and privy), within one hundred feet of the risk on which insurance is desired?

“Answer. No.

“Q. 23. If so, give the size, number of stories, and occupancy of such buildings or exposures, and the distance and the relative position from said risk on the back thereof; and where more than one building is embraced in this application for insurance, locate the number of each on such diagram and mark the distance between each in feet.

“Q. 24. Is such diagram strictly correct?

“A. Yes.

“Q. 25. How many acres in your farm where the above building stands?

“A. Three hundred and five.

“Q. 27. Are you the sole and undisputed owner of said land and the property to be insured?

“A. Yes.

“Q. 30. Is any of such land or buildings encumbered with mortgage, judgment, unpaid amount on bond or contract to purchase, mechanic's lien, or otherwise?

“A. Yes.

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"Q. 31. If so, what is the nature of the encumbrances?

"A. Mortgage.

"Q. And to what amount?

"A. Four thousand dollars."

"That said Stansbury did not in his application state or inform the defendant of the existence of any lien or encumbrance upon said premises except the mortgage above stated, nor in any respect of said lien, nor concerning the number of acres contained in said land, nor concerning the title thereto, nor in respect to buildings within one hundred feet of the risk, nor truly answered said questions, and in and upon the back of said application marked the distance between the said house and barn to be two hundred and fifty feet, whereas in fact said distance is only two hundred and ten feet, and did not mark or indicate on said diagram a house twenty-four feet wide by thirty-five feet long, which was then used as a workshop and store-house, which then stood on said land between said house and barn, which said last-mentioned house and barn were marked and indicated on said diagram, and said workshop and store-house greatly increased the risk in said policy mentioned. . . . That in and by the terms of said application, said Stansbury agreed that said answers so made to the questions therein contained were true, and said diagram strictly correct, and a warranty on the part of the assured."

The policy contained the following provisions: "That the basis of this contract is the said application and obligation, which shall be deemed and taken as a part of this policy, and as a warranty on the part of the assured; and any false or untrue answers or statements therein material to the hazard of the risk shall render this policy null and void. This contract of insurance is wholly embraced in such application and obligation of the insured and this policy."

The answer further alleges, in substance, that at the time said policy was issued and delivered, there was within one hundred feet of the barn mentioned in the complaint, two houses, one a log cabin about fifty feet distant from said barn, which cabin was about fourteen by eighteen feet, and the other a chicken-house and store shed about forty feet distant therefrom.

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On the 18th of October, 1886, the defendant caused the following indorsements to be made on said policy:—

“SALEM, OREGON, October 18, 1886.

“It is understood that the first mortgage given by G. H. Stansbury to G. R. Chrisman has been paid, and that a new mortgage for four thousand dollars has been given to G. R. Chrisman by John A. Lawrence, to whom this policy is assigned. Loss, if any, therefore, made payable to G. R. Chrisman, mortgagee, as his interest may appear, subject to all the conditions of this policy.

“H. W. COTTLE, Secretary.”

The policy declared on also contains this clause: “Loss, if any, payable to G. R. Chrisman, mortgagee, as his interest may appear.” The policy also contained this further provision: “Application and survey No. 7072 made by the assured and said note are hereby made part of this policy, and a *warranty on the part of the assured.*”

The policy bound the company to make good unto the assured, his executors and administrators, all such immediate loss or damage not exceeding in amount the sum or sums insured, *nor the interest of the assured in the property* as shall happen by fire, etc. Said policy also contained the following provision: “The basis of this contract is the said application and obligation, which shall be deemed and taken as a part of this policy, and as a warranty on the part of the assured; and any false or untrue answers or statements therein material to the hazard of the risk shall render this policy null and void.”

A verdict was rendered in favor of the plaintiff for the amount claimed in the complaint. After the verdict had been received and before the entry of judgment thereon, the defendant moved for judgment, notwithstanding the verdict, for the reasons: (1) The complaint does not state facts sufficient to constitute a cause of action in this: The complaint does not allege that the plaintiff had any interest in the property burned, if any, nor what that interest is. (2) The plaintiff by the contract was only entitled to recover in case of loss “as his interest may appear.” This

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motion was overruled and judgment was entered on the verdict, from which this appeal is taken.

1. The overruling of this motion is assigned for error and that is the first question demanding our attention. The complaint not having been demurred to, its sufficiency is tested by this motion. The first question, therefore, demanding our attention is, whether or not a person claiming to recover under a policy of insurance against loss by fire must have had an interest in the property at the time it burned, and whether or not his complaint must allege his interest. The principle is of universal application, and so far as I have been able to discover, without an exception, that the insured must have an insurable interest in the property, both at the time of the insurance and at the time of the loss. The contract of insurance against loss by fire being one purely of indemnity, unless such interest exist, the assured is not injured. (*Howard v. Albany Ins. Co.* 3 Denio, 301; *Freeman v. Fulton Fire Ins. Co.* 38 Barb. 247; *Illinois Fire Ins. Co. v. Marseilles Manuf. Co.* 1 Gilm. 236; *Bevin v. Conn. Mut. Life Ins. Co.* 23 Conn. 244; May on Insurance, § 7; Wood on Insurance, §§ 265, 266.) The plaintiff's interest in the property covered by the policy then being one of the essential facts upon which his right of recovery depends, it must be alleged in the complaint, and without such allegation the complaint is fatally defective. (*Quarrier v. Atna Fire & Marine Ins. Co.* 10 W. Va. 507; *Freeman v. Fulton Fire Ins. Co.* *supra*; *Ruse v. Mutual Benefit Life Ins. Co.* 23 N. Y. 516; *Peabody v. Washington Co. Mutual Ins. Co.* 20 Barb. 339; *Granger v. Howard Ins. Co. of New York*, 5 Wend. 200; 2 Greenleaf on Evidence, § 376.) It must be remembered that this policy was issued to Stansbury, and when he sold the property covered by the policy to Lawrence, he assigned the same to him with the assent of the defendant; but the policy itself was never assigned to the plaintiff, nor is he in any manner a party to the contract. He simply had authority under the policy to receive the money in case of loss "as his interest might appear."

It is true very respectable authorities hold in such case that a

mortgagee, even by alleging his interest, cannot maintain an action on the policy; that not being a party to the contract, he is unable to sue thereon; and that the right to recover by action in case of loss in such case belongs to the insured (*Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Thatch v. Metropole Ins. Co.* 3 McCrary, 387); but it was held by this court, in *Baker v. Eglin*, 11 Or. 333, that a contract made by one person with another for the benefit of a third might be sued upon by the beneficiary. This principle under proper pleadings, I think, would enable the plaintiff to maintain the action. It is true the right to accrue to the plaintiff and the defendant's consent is not an absolute right. It might not exist at all when the loss, if any, would happen. He was authorized to receive the money in case of loss, by making it appear that he had an interest in the property insured when the loss occurred, but not otherwise. There is no allegation in the complaint on this subject, and for that reason the defendant's motion for judgment notwithstanding the verdict ought to have been allowed. (*Moore v. Miller*, 7 Or. 487.) This view requires a reversal of the judgment, but inasmuch as the cause must be remanded for further proceedings I think proper to examine the other question presented.

2. The appellant requested the court to give the jury the following instruction: "That in this case the application is the basis of the contract between the parties and a warranty on the part of the assured, and any false or untrue statements or answers contained therein avoids the policy, whether such statements or answers were material or not." Which was refused and an exception taken. On the same subject the court instructed the jury as follows: "This contract of insurance contains this clause: 'The basis of the contract is said application and obligation, which shall be taken and deemed as a part of this policy, and as a warranty on the part of the assured, and any false or untrue answers and statements material to the hazard of the risk shall render this policy null and void.' Therefore, as I understand the law, the proper construction of this policy and application would be this: 'That before any misstatements or untrue answers in this application could or should affect this

policy, it must appear from the evidence in this case that these statements, or misstatements, or untrue statements were material to the hazard of the risk; or in other words, the mere fact of a misstatement having been made in this application would not of itself be an objection to the policy, unless it were material to the hazard of the risk.’”

An exception was also taken to this charge, and these two exceptions present the main questions in this case. The application and policy taken together constitute the contract of insurance and must be construed as an entirety. They are expressly made so by the terms of the policy, and in determining the rights and liabilities of the parties both must be looked to, and effect must be given to every word contained therein, if possible. In other words, it is the duty of the court to so construe them that no part of either shall be ineffectual, and that all of the language used therein shall have its appropriate and proper force and effect. The decisive question then to be considered is, whether or not this policy contains any warranties. The effect of the charge and refusal of the court was to declare that it did not, and that, however false the application may appear to have been in the particulars alleged in the answer, the policy would not be defeated if in the opinion of the jury they were not material to the hazard of the risk.

It is settled by numerous authorities that a reference in the policy to the application makes the application a part of the contract, and that the answers and statements in such application are warranties. (*Marshall v. Columbia Fire Ins. Co.* 7 Fost. 157; *Jennings v. Chenango County Mutual Ins. Co.* 2 Denio, 75; *Treadway v. Hamilton Mutual Ins. Co.* 29 Conn. 68; *Battles v. York Co. Mutual Fire Ins. Co.* 41 Me. 208; *Tebbetts v. Hamilton Mutual Ins. Co.* 1 Allen, 305; 79 Am. Dec. 740; *Burritt v. Saratoga Mutual Fire Ins. Co.* 5 Hill, 188; 40 Am. Dec. 345; *Kennedy v. St. Lawrence County Mutual Ins. Co.* 10 Barb. 285; *Richardson v. Maine Ins. Co.* 46 Me. 394; 74 Am. Dec. 459; *Kelsey v. Universal Life Ins. Co.* 35 Conn. 225; *Allen v. People's Ins. Co.* 10 Gray, 297; *Chaffee v. Cattaraugus County Mutual Ins. Co.* 18 N. Y. 376; *Blooming Grove Mutual Fire*

Ins. Co. v. McAnerney, 102 Pa. St. 335; 48 Am. Rep. 209; *Trench v. Chenango Co. Mutual Ins. Co.* 7 Hill, 122; *Wood v. Hartford Fire Ins. Co.* 13 Conn. 533; 35 Am. Dec. 92; *Sheldon v. Hartford Fire Ins. Co.* 22 Conn. 235; 58 Am. Dec. 420; *Glendale Wollen Co. v. Protection Ins. Co.* 21 Conn. 18; 54 Am. Dec. 309; *Price v. Phoenix Mutual Life Ins. Co.* 17 Minn. 497; 10 Am. Rep. 166; *Deweese v. Manhattan Ins. Co.* 34 N. J. L. 245; *Mutual Benefit Life Ins. Co. v. Miller*, 39 Ind. 475; *Fowler v. Aetna Fire Ins. Co. of the City of N. Y.* 6 Cowen, 673; 16 Am. Dec. 460; *Alexander v. Germania Fire Ins. Co.* 66 N. Y. 464; *Wright v. Equitable Life Assurance Society of the U. S.* 50 How. Pr. 367; *Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248; *Bank of Ballston Spa. v. President and Directors Ins. Co. of North America*, 50 N. Y. 45; *Le Roy v. Market Fire Ins. Co.* 45 N. Y. 80; *Wall v. East River Mutual Ins. Co.* 7 N. Y. 370; *Blumer v. Phoenix Ins. Co.* 48 Wis. 535; 33 Am. Rep. 830; *Le Roy v. Market Fire Ins. Co.* 39 N. Y. 90; *Parmelee v. Hoffman Fire Ins. Co.* 54 N. Y. 193.)

In *Tebbetts v. Hamilton Ins. Co. supra*, the application for insurance was expressly made a part of the policy and a warranty on the part of the insured, and contained a clause inserted after the printed questions, by which the applicant covenanted and agreed with the company "that the foregoing is a correct statement and description of all facts inquired for, or material in reference to this insurance;" and the by-laws which were expressly made part of the policy provided, that "unless the applicant for insurance shall make a correct description and statement of all facts required or inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, the policy issued thereon should be void." The applicant was held to warrant that all facts inquired for were correctly given, whether material or not; and the omission to mention several buildings within one hundred feet of the property insured, in reply to a question, "what is the distance of said building from other buildings within one hundred feet, and how are such other buildings constructed and occupied; annex a ground plan to the application," would avoid the policy. So

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in *Chaffee v. Cattaraugus Mutual Ins. Co. supra*, the application for insurance against fire formed a part of the policy, and was in the form of answers to printed interrogatories furnished by the insurers. One of them asked the relative situation (of the property to be insured) as to other buildings, distance to each within ten rods, and the printed form concluded with the statement, "all of the exposures within ten rods are mentioned," and it was held that the application constituted a warranty that no other buildings than those named therein existed within ten rods. And it was further held that the insurer reserved the right to determine whether a building within that distance constituted an exposure, and it was error to refer that question in respect to a building omitted in the application as one of fact to the jury. So, also, in *Burritt v. Saratoga County Mutual Ins. Co. supra*, the application was a part of the policy. It was printed, and contained a note in the margin thus: "Relative situation as to other buildings, distance from each of less than ten rods;" and in the blank opposite to this the insured inserted a description of five buildings, which stood within the distance specified, but omitted to mention several others standing within the same distance; and it was held that the omission was fatal to the policy, and this whether material to the risk or not. And the court, per Bronson, J., said: "It is, therefore, the practice of companies which insure against fire to make inquiries of the assured in some form concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak he is bound to make a true and full representation concerning all matters brought to his notice, and any concealment will have the like effect, as in case of a marine risk. (See 1 Phillips on Insurance, 284, 285, ed. of 1840.) It is not necessary for the purpose of avoiding the policy to show that any fraud was intended. It is enough that information material to the risk was required and withheld. This doctrine is fatal to the present action. The

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plaintiff was plainly and directly called upon to state the relative situation of the store as to all the other buildings within the distance of ten rods, and he omitted to mention several buildings which stood within that distance, and among the number was one which was far more hazardous than that to which the policy applied."

As has been before remarked, this contract must be so construed that every word and part thereof shall have effect if possible. This is an elementary rule, to be applied to all writings, whenever any right is claimed under them in a court of justice; but in giving and refusing the charges excepted to, the court below overlooked one essential part of the contract. It is contained in the application, and is quoted above. The effect of the material part of it is that if the applicant does not truly answer the following interrogatories, and correctly describe, state, and make known the property, value, the title, the location, the *exposures*, the occupancy, the liens and encumbrances thereon, or if any misrepresentations or omissions to make known any and all facts material to the risk herein, then the said policy shall in *either event* be null and void. Here the assured was required to make known certain enumerated facts, and concerning which he was particularly questioned, and then he was required to make known all facts material to the risk therein, and a failure *in either event* rendered the policy void.

The instruction given by the court was not in accordance with this construction of the policy, and was, therefore, erroneous. And so as to the instruction refused by the court. The effect of that refusal, and the giving of the instruction complained of, was to declare that said policy contained no warranties; that all the statements by the assured in his application were representations merely and not warranties, and their falsity was of no effect unless material to the hazard of the risk. In this view the distinction between a warranty and a representation was entirely overlooked. The difference between a warranty and a representation is that a warranty must be true, while a representation must be true only so far as the representation is material to the risk, and it is material when a knowledge of the truth

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would have induced the insurers to have refused the risk or to have charged a higher rate of premium. (*Mutual Benefit Life Ins. Co. v. Miller*, 39 Ind. 475.) So it was held in *Burritt v. Saratoga County Mutual Fire Ins. Co. supra*, that there was a material difference between a representation and a warranty; the former is not a part of the contract, but is collateral to it, while the latter is a part of the contract. So, also, in *Fowler v. Aetna Fire Ins. Co.* 7 Wend. 270; 16 Am. Dec. 460, that in case of a warranty it was perfectly immaterial whether the misdescription was the result of fraud or mistake; it is a condition precedent, and no excuse can be received for the non-performance of it. So it was said by Judge Thompson in *Brooks v. Standard Fire Ins. Co.* 11 Mo. App. 349, that "a warranty is a part of the contract, and must be exactly and literally fulfilled. It is in the nature of a condition precedent, and no inquiry is allowed into the materiality or immateriality of the fact warranted. (*Loehner v. Ins. Co.* 17 Mo. 255; *Mers v. Ins. Co.* 68 Mo. 131.) There was in this case no fulfillment of the warranty. There was hence upon the case made by the record no liability on the part of the defendant." And in the *Glendale Manuf. Co. v. Protection Ins. Co.* 21 Conn. 18; 54 Am. Dec. 309, the distinction between a representation and a warranty is thus defined: "The former precedes and is no part of the contract of insurance, and need be only materially true; the latter is part of the contract and policy, and must be exactly and literally fulfilled, or else the contract is broken and the policy becomes void." So in *Higbee v. Guardian Mut. Life Ins. Co.* 66 Barb. 462-480, the court said: "We must hold the law, therefore, to be that where the statement is a warranty, it must be actually true, and whether material or not, its falsity avoids the policy. The falsity of a collateral representation not expressly warranted by the contract will not avoid the policy unless material to the risk. But if false in substance and material to the risk, there can be no liability upon the policy, however innocently the misrepresentation may have been made." And the same doctrine is stated in 1 Wood on Fire Insurance, section 150. Although this policy expressly declares that the application is a warranty

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on the part of the assured, and by reference makes it a part of the policy, the effect of the charge was to make its statements *representations* and not warranties.

The judgment will be reversed and the cause remanded to the court below for such further proceedings as are according to law and the course of practice in said court.

THAYER, J., took no part in this decision, for the reason he had an interest in the result.

[Filed May 14, 1888.]

S. A. PURSEL, APPELLANT, v. R. W. DEAL, RESPONDENT.

PLEADING—CONSTRUCTION.—In the construction of a pleading, the ordinary rule is that it is to be construed most strongly against the pleader.

DORMANT JUDGMENT—MOTION FOR LEAVE TO ISSUE EXECUTION.—If five years are allowed to elapse after the entry of judgment without an execution having been issued thereon, no execution can thereafter issue on such judgment without leave of court.

LEAVE TO ISSUE EXECUTION—MOTION—SUMMONS.—To obtain such leave, the party must file his motion properly verified with the clerk, and cause a summons to be served on the judgment debtor in like manner and with like effect as in actions at law.

SUMMONS—PUBLICATION.—“If a cause of action exist against the defendant,” and the other requisite facts mentioned in section 56 of the Code, the court or judge may order a summons to be served by publication.

“CAUSE OF ACTION.”—The right of a judgment creditor to obtain leave of court to issue an execution on a judgment that has become dormant by lapse of time is “a cause of action,” within the meaning of section 56 of the Code.

PARTY—ACTION RELATING TO REAL PROPERTY IN THIS STATE.—A proceeding to obtain leave to issue execution upon a dormant judgment is not “an action relating to real property in this State,” within the meaning of section 56 of the Code.

VACATING SHERIFF'S RETURN.—If the court below acted irregularly in vacating the sheriff's return on execution, it furnishes no ground of complaint to the plaintiff unless he can show he was injured in some way.

APPEAL from Union County.

T. H. Crawford, for Appellant.

Baker, Shelton & Baker, and G. G. Bingham, for Respondent.

16	295
23	170
18*	461
31*	478

16	295
40	563

16	295
48	304

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STRAHAN, J.—This is a suit to enjoin the enforcement of an execution issued out of the Circuit Court of Union County, Oregon, on a judgment therein, in favor of the respondent R. W. Deal, and against one G. H. Benson. It appears from the amended complaint that on the 3d of May, 1876, R. W. Deal recovered a judgment against G. H. Benson in said Circuit Court of Union County for \$480.14, which was placed in the lien docket of said court; that on the seventeenth day of April, 1880, the plaintiff became the owner by purchase and conveyance from Benson of certain real property, situate in said county of Union, and that plaintiff now owns same in fee; that for more than five years after the entry of said judgment no execution was issued thereon; that on the 27th of September, 1883, Deal made application to said court by motion for leave to issue execution on said judgment; that after the filing of said motion Deal failed and neglected to cause a summons in said cause to be served upon said G. H. Benson, the judgment debtor therein, personally, and that in fact no personal service of said summons was ever had therein upon said judgment debtor, G. H. Benson, but on the contrary service of summons . . . was had or attempted to be had by publication. That said motion and the affidavit for the publication of the summons therein failed to describe or assert that said original judgment of *R. W. Deal v. G. H. Benson* was a lien upon any particular real estate or property in this State. That thereafter the said Circuit Court, on the twenty-seventh day of May, 1881, made an order on said motion granting the same, and specifying the amount for which execution might issue, and caused the same to be entered and docketed as a judgment. That on the 3d of January, 1884, an execution was issued on said judgment, by virtue of which the sheriff of said county sold real property to Deal, and the execution was returned on the 26th of August, 1884, showing these facts.

On the 27th of September, 1886, upon the motion of R. W. Deal, and without notice to said G. H. Benson, the court made and caused to be entered upon the journal thereof an order, quashing, vacating, and holding for naught said return of said sheriff upon said execution. On the 30th of July, 1887, R. W.

Deal caused another execution to be issued on said judgment and placed in the hands of the defendant Hamilton, who is sheriff of said county, who has wrongfully levied the same upon the land which plaintiff purchased from Benson, and has advertised the same for sale to satisfy said execution, interest, and costs.

The amended complaint contains some other allegations not material to be stated. The defendants demurred and assigned two grounds of demurrer: (1) That the complaint does not state facts sufficient to constitute a cause of suit. (2) That there is a misjoinder of parties defendant therein. The court sustained the demurrer, and rendered a final decree dismissing the suit, from which the plaintiff has appealed.

1. The material question to be considered is the first one presented by the demurrer. This presents the general proposition that the complaint does not state sufficient facts to constitute a cause of suit. The main point relied upon by the plaintiff is that under the Code, after five years had elapsed from the date of the judgment without an execution having been issued thereon, it became dormant, so that no execution could be issued without leave of court, and that the statute regulating the method of procuring such order had not been complied with. The particular irregularity relied upon by the present plaintiff is that personal service was not made on Benson, "but on the contrary, service of the summons . . . was had or attempted to be had by publication. That said motion and the affidavit for the publication of the summons therein failed to describe or assert that said original judgment of *R. W. Deal v. G. H. Benson* was a lien upon any particular real estate or property." This is the entire statement in the complaint of the supposed want of jurisdiction, and as a complete answer to it, it might be sufficient to say that it wholly fails to negative the fact or show that Benson did not appear on the hearing of said motion by himself or attorney, or that said proceeding was had or taken against him without notice; nor does it appear whether he was at the time a resident of the State or not; nor does it appear what was the particular ground or reason for ordering the publication of the summons.

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In construing a pleading, the ordinary rule is that it is to be construed most strongly against the pleader, and if that rule be applied to this pleading, it is certain that it does not go far enough to show that in making the order complained of the Circuit Court of Union County acted without jurisdiction. But in presenting this case, the counsel on each side expressed the desire that the court would proceed to consider and decide it so as to determine the ultimate rights of the parties, disregarding any mere questions of form which might be amended, or which are not necessarily decisive of those rights. To reach that result it must be assumed that the complaint is full enough in its statements to negative every fact upon which jurisdiction could hinge except as to the publication of the notice. Waiving every other question, I will therefore proceed to examine the sufficiency of the publication so far as the facts are alleged in the complaint.

2. Section 295 of the Code provides that whenever after the entry of judgment a period of five years shall elapse without an execution being issued on such judgment thereafter, an execution shall not issue except as in this section provided. Then follows six subdivisions of said section, prescribing and regulating the mode of procedure to obtain leave of court to issue execution. The first subdivision provides that the party in whose favor judgment is given shall file a motion with the clerk, when the judgment is entered, for leave to issue an execution, and prescribes what the motion shall contain, and how subscribed and verified. Subdivision 2 of said section is as follows:—

“2. At any time after filing such motion the party may cause a summons to be served on the judgment debtor in like manner and with like effect as in an action at law. In case such judgment debtor be dead, the summons may be served upon his representatives by publication, as in case of non-resident, or by actual service of the summons.”

Section 56 of the Code regulates the service of a summons by a publication. The substance of the requirements of that section are, that it must be made to appear to the satisfaction of the court, or judge, or justice of the peace in an action before

him, that the defendant cannot be served with summons in the manner prescribed by section 56 of the Code, and that he cannot after due diligence be found within the State; *and also that a cause of action exists against him*, or that he is a proper party to an action relating to real property in this State.

If either of these conditions exist, then such court or judge is authorized to order that the service of the summons be made by publication in either of the following cases: "(1) When the defendant is a foreign corporation and has property within the State, or the cause of action arose therein. (2) When the defendant, being a resident of this State, has departed therefrom with the intent to defraud his creditors, or to avoid the service of summons, or with like intent keeps himself concealed therein, or has departed from the State and remained absent therefrom six consecutive weeks."

This statute is very plain and comprehensive in its terms, and was designed to cover every case wherein a suitor in the courts of this State is entitled to relief against any corporation or person therein specified. So that if it was made to appear to the satisfaction of the court or judge "that a cause of action existed against the defendant, or that he was a proper party to an action relating to real property in this State," and the other conditions enumerated in the section existed, the court was authorized to order the service by publication.

The complaint in the case now before the court is silent as to whether the other conditions required by the section existed or not; but according to the rule already adverted to for the construction of a pleading, it must be assumed that they did. The only jurisdictional objection, therefore, which is or can be relied upon to defeat the effect of this publication is, "that the motion and affidavit for the publication of the summons therein failed to describe or assert that said original judgment of *R. W. Deal v. G. H. Benson* was a lien upon any particular real estate or property in this State." This objection is clearly based upon the second alternative in the section, that is, that the defendant "is a proper party to an action relating to real property in this State"; but it entirely overlooks the other. Under the first, the

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service of the summons may be had where it "appears that a cause of action exists against the defendant."

It is not alleged that this fact was not made to appear to the court or judge at the time the summons was ordered to be published; and therefore, in testing the sufficiency of this pleading, it is to be presumed that the fact did appear. This view necessarily assumes that the right in the plaintiff to have this judgment renewed after it had become dormant, so far as the power of enforcement extended as against Benson, "was a cause of action"; and I feel no doubt of its correctness. Unless it be so, the publication of the summons could not be had in cases where it is desired to obtain leave to issue execution. To obtain the order under the other clause of the statute, it would have to be made to appear that the defendant was "a proper party to an action relating to real property in this State," a conclusion which could not be sustained. It would be a strained and unreasonable construction to hold that a motion filed by a plaintiff to obtain leave to issue an execution on a dormant judgment is "an action relating to real property in this State."

This conclusion renders it unnecessary to decide the other question presented, but to avoid misapprehension on the subject, it may be proper to add that I have no doubt that the sheriff in whose hands the execution was placed for enforcement was a proper defendant in the suit. Nor do I think it necessary to advert to the action of the court in vacating the return of the sheriff.

The Circuit Courts necessarily have a very large discretion over their records, officers, and process, and it is their duty to see that their process is not abused, and that their officers when acting under process, do not exceed their authority. Unless an abuse of this power by the Circuit Court is clearly shown, this court would never interfere with its exercise. Nor does it appear that this plaintiff was in any manner injured or affected by its exercise in this particular instance. No difference how irregular may have been its exercise, or even the discretion of the court may have been abused, still it furnishes the plaintiff no cause of complaint unless he can show some injury.

Points decided.

[Filed May 15, 1888.]

GEORGE WEAVER, ADM'R WITH WILL ANNEXED OF
THE ESTATE OF HANS WEAVER, DECEASED, APPELLANT,
v. ESTHER OWENS, IMPEADED WITH C. W. JOHN-
SON, ADM'R OF THE ESTATE OF W. F. OWENS, DE-
CEASED, RESPONDENT.

FRAUDULENT CONVEYANCE — EVIDENCE OF INTENT. — In a suit by a judgment creditor against a defendant to subject real prop. rty to the payment of the judgment, upon the grounds that the debtor purchased the property, and caused a deed thereof to be made to the defendant with intent to hinder, delay, and defraud the creditors of the debtor, the question of fraudulent intent is one of fact and not of law; and in order to entitle the plaintiff in the suit to the relief, he must establish such fact, either by direct proof, or by the proof of facts and circumstances from which the intent may reasonably be inferred, and he must also allege and prove that he was so hindered, delayed, or defrauded. In suits of the character referred to, the question of fraudulent intent must be determined from the facts and circumstances of the particular case decided. The law furnishes no test by which it can be determined further than it adjudges what acts are *indicia* of fraud, or which constitute badges of fraud.

ADVANCEMENT — FRAUDULENT INTENT. — Where it appeared that one O. bought a house and two lots at the price of eight hundred dollars, and had the deed executed to his daughter, a girl fifteen years of age, who was residing with her father and being supported by him; that O. was largely indebted at the time; that among his liabilities was one in favor of W. on account of the latter becoming security for him upon a bond of ten thousand dollars executed to the bank, to enable O. to obtain a credit for such amount; that O. had drawn from the bank nearly seven thousand dollars more than his deposits at the time the deed was executed; that about a month and a half thereafter O. gave a new bond to the bank for the sum of fifteen thousand dollars for the like purpose, upon which W. also became security, and the ten-thousand-dollar bond was surrendered; that O. continued his account at the bank for more than a year and a half after the execution of the deed, when his business collapsed and he suddenly died; that during the time referred to his indebtedness greatly augmented; that the day before he died he executed his promissory note to W. for the sum of three thousand dollars, supposed to have been on account of the latter's liability as such surety for him; that W. commenced an action against O. upon the said note on the day on which the latter died, and subsequently recovered a judgment against his administrator for the amount. And it appearing also, that O. was extensively engaged in business at the time of the execution of the deed, was receiving and paying out large sums of money, was the owner of lands and live stock, notes and accounts, appraised at his death at more than twenty-five thousand dollars; that his account at the bank, debit, and credit, between the time of the execution of the deed and of his death, amounted to fifty thousand dollars; that the balances against him at the latter time was on account of checks, drafts, and orders drawn by him upon the bank within the three or four months next prior to his death; that during the same period he received from and paid to other parties various sums of money amounting to many thousands dollars; that he promptly paid demands against him, and maintained his credit to within three months of his death; that he paid off all indebtedness

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against him existing at the time the deed was executed, excepting one note of twelve thousand dollars, and he paid four thousand dollars upon that; but that he incurred other indebtedness, and died hopelessly insolvent. It also appeared that he purchased the house and lots subject to a mortgage of two hundred and fifty dollars, and that he turned in as part payment of the purchase price a plow and wagon. It further appeared that the conveyance of the property to the daughter was intended by O. as an advancement to her, similar to one he previously made to her elder sister; that the deed was not filed for record until the day before his death, but that he made no effort to conceal the fact; nor did it appear but that W. was cognizant of it when he signed the second bond; nor did it appear that he attempted to dispose of any of his other property in order to evade the payment of his debts. *Held*, by the majority of the court in a suit by the administrator of W. to subject the house and lots to the payment of the judgment upon the note, that such facts did not warrant the inference that O. caused the deed to be made to the daughter with intent to hinder, delay, or defraud his creditors, or that W. was so hindered, delayed, or defrauded in consequence thereof; that if the conveyance had included a considerable portion of O.'s property, thereby having the effect to deprive creditors of a material part of their security, or have crippled him in the prosecution of his business, such an inference might reasonably be deduced; but the advancement in view of all the facts and circumstances of the case was too insignificant to justify it.

Per STRAHAN, J., dissenting.

VOLUNTARY CONVEYANCE BY ONE WHO IS INSOLVENT.—A voluntary conveyance to a child by one who is an insolvent, where he continues in the possession of the property and fails to put the deed on record unexplained, evinces a fraudulent purpose and design to keep the state of the title to the property concealed, and mislead those with whom the party had dealings.

VOLUNTARY CONVEYANCES—FRAUDULENT INTENT.—When a party conscious of his insolvent condition, causes the title to a piece of real property to be vested in his minor daughter, with the intent of placing it beyond the reach of his creditors, and fails to record the deed, and continues in the possession of the property, such transaction is fraudulent in fact, and a creditor may attack it for that reason.

SUBSEQUENT CREDITOR—WHO NOT DEEMED.—When a party is insolvent and continues in business, and is constantly contracting new debts and paying off old ones, and makes a voluntary disposition of his property, such *new creditors* are not to be deemed *subsequent creditors* within the meaning of those authorities holding that a subsequent creditor cannot attack a conveyance for fraud.

STATUTORY CONSTRUCTION.—The statute prohibiting fraudulent conveyances ought, for the purpose of accomplishing its objects, to be liberally construed.

APPEAL from a decree of the Circuit Court for the county of Douglas.

J. W. Hamilton, and *J. C. Fullerton*, for Appellant.

Lane & Lane, and *W. R. Willis*, for Respondent.

THAYER, J.—The appellant, as such administrator, on the twenty-fourth day of September, 1886, commenced an action in

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said Circuit Court against the said W. F. Owens, upon a promissory note executed by him to the said Hans Weaver in his lifetime. A writ of attachment was issued in the action, and certain property belonging to said Owens was attached by virtue thereof. Owens died on the following day after the action was commenced; he, as a matter of fact, committed suicide. The action was continued against Owens' said administrator, and a judgment for the sum of \$3,000 and costs was recovered therein, and an order granted to sell the attached property. Said property was sold in accordance with said order, and \$602.71 realized therefrom. Subsequently a general execution was issued upon the judgment, which having been returned unsatisfied, the appellant brought a suit against the respondent to set aside as fraudulent a certain deed to lots 1 and 2, block 53 B, in railroad addition to the city of Roseburg, Oregon, executed by one W. H. Kearnan to the respondent on the fourteenth day of February, 1885, in which suit said Johnson, as such administrator, was included as a defendant, but failed to interpose a defense therein.

The appellant alleged in his complaint in said suit that on said fourteenth day of February, 1885, and prior thereto, the said W. F. Owens was largely indebted to Hans Weaver, appellant's testator, and to other parties, and that at said date, and at all times thereafter, was wholly insolvent; that the said Owens purchased the said lots from said Kearnan, well knowing his insolvent condition, and caused the deed thereto to be made to the respondent, his daughter, who was only about fifteen years of age, and who at the time was residing with her father, being supported by him; that said W. F. Owens caused the said property to be so conveyed, with intent to cheat, hinder, delay, and defraud the said Hans Weaver, and his other creditors, and for the express purpose of preventing the said property from becoming liable to the payment of his debts; that the respondent did not furnish the purchase money for said property, or any part thereof, and has no interest whatever therein, other than to hold the legal title for the benefit of her father.

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The respondent by her guardian *ad litem* filed an answer to the complaint denying all the material allegations therein contained. The case coming on for hearing before the said Circuit Court upon the allegations and the proofs taken therein, the said court found that it was not true that said Owens caused the said deed to be so executed; and that the respondent was entitled to a decree dismissing the complaint, which is the decree appealed from herein. The appellant's counsel insist that upon the complaint, and the testimony coming here with the transcript, that a decree should have been given in the appellant's favor for the relief claimed in his complaint. Said counsel have submitted a list of authorities in support of their position, but the question to be determined is purely one of fact.

The law adjudges that certain facts and circumstances in such cases are *indicia* of fraud; but the intent must be proved and found as a fact by the jury, where the case is tried by a jury, and by the court, when it is to be determined by the latter. The fraudulent intent is seldom susceptible of direct proof, but facts and circumstances must be established from which it can be reasonably inferred. The statute declares that the fraudulent intent shall be deemed a question of fact and not of law. (Code, § 3062.) Hence the same rules of proof apply to other cases involving questions of a similar nature.

The allegation must be established by a preponderance of evidence. Nor will the establishment of the fact that the conveyance was made with the intent to defraud creditors be alone sufficient to entitle a plaintiff to relief; he must aver and prove that he was hindered, delayed, and defrauded. The language of the statute is that the fraudulent act "as against the person so hindered, delayed, or defrauded shall be void." (Concluding part of § 3059 of the Code.) The plaintiff must allege and show, not only that the defendant did the act with the intent mentioned, but that he was so hindered, delayed, or defrauded.

The complaint in the suit herein contains no allegations of the value of the lots referred to, or that Owens paid any money therefor, nor that the appellant's testator was in any manner injuriously affected in consequence of the transaction. How can

it be known from the complaint, or from the proofs as to that matter, whether Hans Weaver was not cognizant of the fact that W. F. Owens had the deed to the lots executed to the daughter, and acquiesced in it when he executed the bond on the twenty-seventh day of March, 1885, out of which the indebtedness to him is supposed to have arisen? There is no allegation in the complaint that it was done secretly or clandestinely, or that Weaver was ignorant of the fact; and the evidence discloses that Owens talked freely with other parties of his having purchased the property for his daughter.

It appears from the proofs that Owens wanted credit at the bank, and as collateral security for balances from overdrafts he executed bonds to the bank, and said Hans Weaver, R. Phipps, and others became sureties for him thereon. The first bond was for the sum of ten thousand dollars, which was executed some time prior to the fourteenth day of February, 1885. The amount of the bond was placed to Owens' credit upon the books of the bank, and he drew checks, drafts, and orders against it. The amount of his account varied from time to time; on the said fourteenth day of February the amount of balance on an overdraft was nearly seven thousand dollars. Subsequently, and on the twenty-seventh day of March, 1885, this bond was surrendered up, and another, for the sum of fifteen thousand dollars, was executed by the same parties and put in its place. Owens continued his account with the bank, which amounted, debit and credit, at the time of his death to fifty thousand dollars. The balances, I suppose, were made up daily, and the amount against him at his death was upon drafts, etc., drawn within the three or four months next prior thereto. How much that balance was does not appear from the briefs of counsel, but it will not be presumed to have exceeded the penalty named in the new bond. The inquiry then is, did Owens with intent to defraud Weaver out of his claim, on account of his becoming surety for him on these bonds, or either of them, cause the said two lots to be conveyed to his daughter as alleged? That question must be solved like any other question of fact. The reply must come from the proofs. It cannot be answered by meta-

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physical reasoning drawn from supposed facts or adjudged cases. Every case involving such a question must be determined by its own peculiar circumstances.

The abstruse distinctions made by courts in cases before them can be of very little assistance to us; we must take the facts established by the proofs in this case, and draw such inferences and conclusions as our knowledge of human affairs and our best judgment dictates. That, in my opinion, is the only proper course to be pursued. We sit here in this matter more in the capacity of a jury than of a court; and we should consider it in the light of that understanding of the dealings and transactions of men in general, which is gained from observation and experience. The evidence upon the part of the appellant given in support of the allegation of a fraudulent intent upon the part of Owens in having the lots deeded to his daughter is very slight and inconclusive.

The deposition of J. J. Thornton, a witness on behalf of the appellant, shows that witness and his father had a mortgage on the lots for two hundred and fifty dollars; that witness met Owens and Kearnan in the court-house looking over papers, the mortgage he "reckoned," and Mr. Owens told him that he would pay the mortgage, and to let it run until the time run out; that he did not know what was the consideration paid to Kearnan for the property, "only what Kearnan told him." Upon being asked what Kearnan told him he answered, under objection, that if he had not forgotten it was eight hundred dollars.

The deposition of A. W. Caulfield, another witness for the appellant, shows that he, witness, performed labor on the building on the lots, but the time he could not specify; that Owens hired him to do the work and paid him; that it was after the reported sale from Kearnan that Owens said he had bought the lots; that he supposed Owens was in possession of the property; that he seemed to have control of it; but about that same time he claimed that he had given the lots to Esther. He remarked that Effie, the oldest girl, was displeased because he had given Esther the Kearnan house, which was a better house than the

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one he had given her; that he said this at the time witness was working on the house; that he judged from what he had heard that Esther, on the fourteenth day of February, 1885, was about fifteen years of age; that she lived with her parents.

This is the substance of the entire evidence regarding Owens' purchase of the lots for the daughter. Copy of the deed was given in proof, and formally recites a consideration of eight hundred dollars as paid, but does not state by whom paid, and it appears therefrom that the deed was filed for record September 23, 1886. The note upon which the judgment was recovered in the action was for the payment of three thousand dollars, and bears the same date of the filing of the deed for record. All the other evidence in the case was addressed to the question of Owens' financial condition, and I agree fully with the circuit judge, "that as to whether Owens was insolvent on February 14, 1885, I am unable to find from the evidence in the case."

The deposition of W. S. Humphrey, a witness for the appellant, shows that on or about the fourteenth day of February, 1885, said Owens was indebted to the banking firm of Humphrey and Flint, of which witness was a member, nearly seven thousand dollars; that the indebtedness accrued by checks, drafts, and orders drawn on the firm by Owens, and paid by them; that the checks, etc., were not paid on Owens' individual security, but under a bond upon which Weaver, Phipps, and others were security as before mentioned; that witness did not know what property Owens possessed at that time.

Upon cross-examination witness was asked: "Whether it were not a fact that Mr. Owens had an account with you in the bank, and that he had paid in and drawn out since the fourteenth day of February, 1885, a large amount more than he was owing you at that date?" To which the witness answered: "Yes, sir; I would think that he had; I could not say." The witness was also asked the following: "Has he not paid in and drawn out as much as fifty thousand dollars from that time to the time of his death?" To which the witness answered: "I should think he had."

The deposition of W. S. Hamilton, a witness for the appel-

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lant, shows that Owens was indebted to S. Hamilton, on the fourteenth day of February, 1885, upon a promissory note, to the amount of twelve thousand dollars; that four thousand dollars of the principal of the note was paid in August or September, 1886; that the balance remained unpaid; that the note was given January 29, 1884, and that Hans Weaver signed it as security; that Owens had no property on the fourteenth day of February, 1885, that witness was certain of; that witness had a conversation with Owens about the purchase of the lots shortly after he purchased them, and that Owens said that part of the consideration was a plow and a wagon; that he turned them in on the trade.

Upon his cross-examination the witness stated that Owens was in the commission merchant business; was doing a large business in buying grain, wool, and such things; that as far as witness knew, Owens continued to do business and pay demands against him until a very short time before his death.

The said C. W. Johnson, administrator of Owens' estate, was called by appellant as a witness, and testified, that the value of the assets of the said estate, as appraised, amounted to \$25,598.41, against which there had been filed counter-claims amounting to \$5,987.93; that none of the assets were real property, but consisted almost wholly of notes and accounts; that he supposed three or four thousand dollars would be collected; that the reason the amount as appraised could not be collected was principally because the books were kept in such a way; that while the accounts appear to be straight, it would be proven that they are almost wholly erroneous; that the liabilities of the estate, so far as claims against it had been presented, amounted to \$61,026.42, and he was reasonably satisfied that there was at least \$40,000 of outstanding claims which had not been presented. The witness was asked to state from the books, letters, papers, and other data in his possession, whether or not said Owens was solvent on the fourteenth day of February, 1885. To which he made answer that he was reasonably satisfied Owens at said date was entirely insolvent. This testimony, however, was clearly incompetent.

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The witness upon cross-examination stated that he did not know of any debt due to Hans Weaver at that time which had not been paid, nor any debt that Hans Weaver, or his administrator since his death, had paid for Owens as security or otherwise.

The deposition of Asher Marks, a witness for the respondent, shows that witness had known said Owens since childhood, twenty-five or thirty years; that his business was grain and wool, etc., commission merchant; that he had had financial dealings with Owens since the fourteenth day of February, 1885; that during that time Owens had been indebted to him in the course of his business dealings with him as much as ten or fifteen thousand dollars; that the various sums of indebtedness since that time together would probably amount to twenty-five or thirty thousand dollars, and that Owens paid the same; that he had fair opportunities, in some respects, of knowing the manner in which Owens conducted his business, and that he thought he was solvent at as late a period as February, 1886.

In answer to questions upon cross-examination, the witness stated that he knew enough of Owens' solvency at that time not to be afraid to trust him; that he could not swear Owens was solvent, but it was his judgment that he was; that from what he had ascertained about Owens' affairs since his death, it appears he was not solvent February, 1886. Witness thought that Owens had, on the fourteenth day of February, 1885, in notes, accounts, stock, cattle, and everything he had, property to the value of twenty thousand dollars; that from the amount of Owens' liabilities, ascertained at his death, witness was of the opinion that he could not have been solvent in February, 1885, or at any time thereafter.

Upon redirect examination, the witness was asked the following question: "Do you not know that he (referring to Owens) paid off all claims presented to him up to within a year of his death?" To which he answered: "I think he did." Also the following: "Do you know of any debt that he owed that he did not pay off when demanded up to within a year of his death?" To which the witness answered: "I do not; he always paid me."

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The witness gave further testimony upon that point, and others were called who testified substantially to the same effect. From all the evidence in the case it may be inferred that Owens carried on the business in which he was engaged for a number of years upon a large scale; that he had the confidence of the community, obtained extensive credit, and conducted his business mainly upon borrowed capital; that he was not lacking in energy, was not addicted to any vices, met his engagements with reasonable promptness, but was generally unthrifty, and signally failed in the end. His financial course was by no means a commendable one, though it is the same that thousands have followed. It is a course pursued by a class of vain and ambitious persons, devoid of caution, prudence, and foresight, and which is certain to terminate in monetary disaster. Such persons are not actuated by dishonest motives; they intend to be upright, though their necessities often force them to do acts of a suspicious character. They are always hopeful and sanguine, and their faith in their ultimate success never fails until they are overwhelmed with ruin. W. F. Owens probably never intended to wrong any one. He conceived that it was his mission to do good, and he doubtless expected, not only to liquidate all his liabilities, but also to acquire such a fortune as would enable him to be a benefactor, and in my opinion it would be unkind and uncharitable to conclude that he swapped the plow and wagon for the lots, and took the deed in his daughter's name, with intent to cheat his surety, Weaver, or any one else; nor can such intention be gathered fairly from the evidence. It appears therefrom that Owens, at the time the lots were purchased and the deed executed, was at the height of his imaginary success; he was receiving and paying out large sums of money amounting to thousands of dollars, compared to which the eight hundred dollars, purchase price of the lots, was a very small trifle. There is not a slip of testimony in the case showing that he ever attempted to dispose of any of his other property, consisting of land, cattle, notes, and accounts, appraised after his death at more than twenty-five thousand dollars, to delay or defraud his creditors. His credit was good at the time, and he

made no effort to conceal what he did. The deed, it is true, was not put upon record when executed, but if it had been it would not practically have imparted any notice.

The recording of a deed will enable a subsequent purchaser of the property to ascertain the condition of the title, because he will search the records and find out; but as to third persons generally, it affords no notice in fact. In a town of the size of Roseburg such matters are learned much more readily from gossip than from the county records. It seems to me that to require a court to believe from the facts and circumstances of this case that Owens had the deed to the lots executed to his daughter, with the intent of preventing the property from becoming liable to the payment of his debts, overtaxes credulity. It is not a case where a debtor has voluntarily disposed of a material part of his property, seriously affecting his ability to pay his debts; nor one in which he has diminished his capital by settling upon members of his family such a portion of it as to cripple his business operations. It was a trivial advancement to his daughter, similar to one which he had previously made to an elder daughter, an act which Hans Weaver would undoubtedly have commended, and very probably did approve of. If Owens had purchased a piano and given it to the girl, no creditor, nor probably the administrator of any creditor, would have objected to it; and yet the grounds for charging it to have been done with a fraudulent intent, as against Owens' creditors, would have been equally tenable. There are no facts from which the inference of an intent upon the part of Owens to defraud his creditors can be drawn, except that he was indebted at the time, was, as a matter of fact, insolvent, and the advancement was a voluntary settlement. Such an inference might be justified, if the cost of the lots had been a considerable portion of Owens' property; but as it included only the paltry sum of eight hundred dollars, made up of a plow and wagon, and the assumption of a mortgage upon the property for two hundred and fifty dollars; that the transaction took place before the actual debt in question accrued, during which time Owens received and disbursed thousands of dollars; and that no general intention is

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shown on his part to defraud his creditors, such an inference to my mind would be absurd. The inference in such cases must be founded on facts legally proved, and such a deduction from those facts as are warranted, among other things, by a consideration of the particular propensities or passions of the person whose act is in question. (Code, § 773.)

W. F. Owens certainly exhibited no propensity to dispose of all his property, or any material part thereof, so as to prevent it from being applied to the payment of his debts. If he had entertained any such disposition, he would not have been likely to have paid the four thousand dollars to S. Hamilton in August or September, 1886, a year and a half or more after the lots were deeded; nor have paid in at the bank the seven thousand dollars overdraft, which had been drawn when the deed was executed, and the various sums to Asher Marks and others. If such had been the bent of his mind, he would not probably have stopped with securing to his own use and benefit the little dab of property which the lots constituted. I am very strongly impressed with the belief, from all the facts and circumstances as shown herein, that the charge in the complaint of the fraudulent intent upon the part of Owens in the affair considered is not sustained; and that the findings of the Circuit Court cannot be disturbed unless we abandon that course in which intuitive sense and reason are the safest and surest guides to truth, and follow the tortious pathway of vagary. It is not a question of law we are dealing with, but, as said in the outset, a pure question of fact; and the deductions to be drawn are those which our reason makes from the facts proved, without an express direction of the law to that effect. (Code, § 771.)

I am of the opinion that the decree appealed from should be affirmed.

LORD, C. J.—Upon the facts as presented by this record, I concur in the result.

STRAHAN, J., dissenting.—This is a suit prosecuted by the appellant as administrator with the will annexed of Hans Weaver, deceased, to subject certain real property now held in the name of

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the defendant Esther Owens to sale to satisfy a judgment recovered by the plaintiff against the defendant Johnson, as administrator of the estate of W. F. Owens, deceased. It appears from the evidence that on the fourteenth day of February, 1885, W. F. Owens purchased the property in controversy of W. H. Kearnan for the consideration of \$800, and caused the same to be conveyed to his infant daughter, Esther Owens; but the deed was never filed for record until the twenty-third day of September, 1886. That Owens entered into the possession of said real property and improved the same, and continued in the possession thereof up to the time of his death. Prior to February 14, 1885, Hans Weaver, plaintiff's intestate, and R. Phipps had become surety for Owens to Humphrey and Flint, bankers at Roseburg, in the sum of \$10,000, and said liability, or the greater portion thereof, still existed when the deed in question was made. On the twenty-seventh day of March, 1885, the plaintiff's intestate, Hans Weaver, and R. Phipps became surety for Owens to said Humphrey and Flint in the sum of \$15,000. On the twenty-fourth day of September, 1886, the plaintiff commenced an action against W. F. Owens in the Circuit Court of Douglas County to recover \$3,000, and caused the property in controversy to be attached. On the twenty-fifth day of September, 1886, said Owens died intestate, in Douglas County, Oregon, and the defendant C. W. Johnson was duly appointed his administrator, who was substituted as defendant in said action for Owens, and by order of the court said action was continued against him as such administrator, and so prosecuted that the plaintiff recovered a judgment for the sum of \$3,000, and the attached property was ordered to be sold. Some property other than that now in controversy was also attached from the sale, of which \$602.71 was realized. The necessary facts are alleged in the complaint to present for our decision the fraudulent intent and purpose of Owens in causing said property to be conveyed to his infant daughter; his inability to pay his debts at the time, and that he was insolvent then, and so continued up to the time of his death; that Esther paid nothing for said property, and never had any interest therein

except to hold the legal title thereof for her father's use and benefit.

The cause was referred and the evidence taken in writing, from which the court found the fact in favor of the plaintiff, and dismissed the suit, from which decree this appeal is taken.

1. There is no conflict in the evidence. W. F. Owens at the time of his death was indebted to various persons, including the plaintiff's intestate, in the aggregate sum of at least \$100,000, and the only assets which he left were some accounts and notes, appraised at \$25,598.41, from which the administrator says only from \$3,000 to \$4,000 can be collected. It does not appear that during any of the time from February 14, 1885, to the time of his death Owens owned any property that could have been reached by execution; the witness knew of no such property. It is true he received and paid out large amounts of money during that time; but he was engaged in buying and selling grain, wool, etc., and in the absence of direct proof on that subject, it is to be presumed that he conducted that business in the usual way; that is, he received advances from time to time from persons wishing to purchase, and the seller received the money from Owens, and the only interest that Owens had in the transaction was to act as "middleman" between seller and buyer, and to receive his commission. There is no attempt on the part of the defendants to prove that at or during any of the time from the date of the deed conveying the land in controversy to Esther and the death of Owens, he sustained any large losses or reverses of any kind in business, or to prove that during any part of said time he had any visible property which could have been reached by creditors or subjected to the payment of their claims. It appears clearly from the evidence that at the time Owens caused the deed to be made to Esther he was utterly insolvent, and so continued to the time of his death; but it also appears that during the same time he continued in business, buying and selling produce and contracting new debts and paying off old ones, and for this purpose he frequently secured loans. It does not appear that during that time he made any gains; what losses he sustained does not clearly appear, although Asher Marks, a very

intelligent witness on the part of the defendants, and who had considerable knowledge of the Owens' business, says that his losses continued from the time he commenced business up to his death, which would cover a period of several years. The administrator testifies that about \$60,000 of claims have been presented to him and allowed, and that he knows of about \$40,000 more which had not been presented.

Mr. Humphrey explains the transaction of Owens, Weaver, and Phipps at the bank. He says: "When they gave the new bond, he (Owens), drew on the amount due on the old bond and took credit due on the *old bond*." In further explanation of the same matter he says: "As I stated before when we took the new bond, and he drew his check and *took credit* for the amount due on the old bond, I presume there would be nothing due on the old bond. I suppose that it would wipe that out, or at least we do not hold for anything drawn on the old bond, as it was all brought under the new bond. That is, as I understand this evidence, there was some portion of the \$10,000 covered by the first bond which Owens had not drawn when the new security was given. For that balance he drew his check, and it was by mutual consent carried forward as a part of the new credit, which he obtained at the bank by the execution of the new bond of \$15,000." It also appears that Owens at the time of his death owed Humphrey and Flint a considerable sum on account of these bonds, in explanation of which Mr. Humphrey testifies that a part of what was drawn by Mr. Owens under the bond which was in force on the fourteenth day of February, 1885, the date of the deed, goes to make up the amount that Owens owed Humphrey and Flint at the time of his death, and those are some of the charges against him. It does not appear when or how the particular indebtedness of \$3,000 sued on accrued, but the note bears date September 23, 1886, just two days before Owens' death, and the same day the deed to Esther was recorded.

2. Owens was in the possession of this land when this note was made, and it is not pretended that there was any change of possession on that day. The deed was recorded on the same day, but it does not appear whether it was before or after the note

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was made, nor as I view the subject, is it material. The fact that he continued in the possession of this property, and never put the deed to his daughter on record until his insolvency was known, I think evinces a fraudulent design and purpose to keep the real state of the title to this property concealed, and to mislead those with whom he had dealings. When the catastrophe overtook him and exposure could not be avoided, when further concealment became dangerous, he then placed the deed on record. Under the facts disclosed by this record, I think this conveyance ought to be held to be fraudulent as to this plaintiff. Taking the most favorable view of the facts for the defendants, all that can be claimed for them is that Owens was insolvent and was endeavoring to save something from the wreck for his daughter, at all events, and without regard to his ability to pay his debts. This would render the transaction constructively fraudulent. But I think the facts justify and require us to draw a stronger inference against the defense, and that is, that at the time Owens caused this deed to be made he was conscious of his insolvent condition, and was desirous of placing this particular piece of property secretly beyond the reach of his creditors. No doubt he had a vague hope that he might be able to meet his liabilities, and would have done so if it had been possible; but he intended if the worst should come to place the deed on record, and let his daughter hold the property if she could. This view of the case renders the transaction fraudulent in fact, and enables any creditor to attack it for that reason. (Code, § 3059.) But counsel for respondent argued that no person other than an existing creditor at the time of the transaction could question it for fraud. I doubt whether or not that rule ought to be applied to this case under any possible aspect of the facts. Here the transaction is conceded by the defendants' counsel to have been fraudulent as to existing creditors. But where a party is insolvent and continues in business, and is constantly contracting new debts and paying off old ones, and makes a voluntary disposition of his property, such new creditors are not to be deemed *subsequent creditors* within the meaning of the rule invoked by counsel.

In *Savage v. Murphy*, 34 N. Y. 508; 90 Am. Dec. 733, this principle was involved, and the court said: "The indebtedness then existing was merely transferred, not paid, and the fraud is as palpable as it would be if the debts now unpaid were owing to the same creditors who held them at the time of the transfers." A like principle is announced in *Paulk v. Cooke*, 39 Conn. 566. The court said: "But it is said that the debts which existed at the time that conveyance was made have since, with one exception, been paid; and that a voluntary conveyance can be impeached only by those who were creditors at the time, not by subsequent creditors. This principle clearly has no application, where there has been a continued, unbroken indebtedness. The debts are owed, though they may be due to new creditors. It is the most unsubstantial mode of paying a debt to contract another of equal amount. It is the merest fallacy to call such an act getting out of debt. From the time of this conveyance, Mr. Cooke continued to be in debt, and at the time of this assignment that indebtedness had largely increased. His means of payment had even more largely diminished." And the court ordered the property conveyed to be applied to the payment of the subsequent debt. And in *Savage v. Murphy*, 8 Bosw. 75, Hoffman, J., reviewed the earlier decisions by which subsequent purchasers and creditors were permitted to question conveyances as being fraudulent, and then laid down this proposition: "When a deed is made to defraud creditors by one at the time in debt, and who subsequently continued to be indebted, it is fraudulent and void as to all such subsequent, as well as existing creditors." And a late writer sums up the doctrine thus: "The embarrassment of the debtor when the transfer was made calls into being the claims of, and obligations to the creditors; the deficit then existed, and the liability has been merely transferred to new parties, while the debtor's embarrassed estate has been further crippled or rendered hopelessly insolvent by the voluntary alienation. It seems to follow that the safer and more prudent rule would be to hold that no voluntary conveyance by an embarrassed debtor should be upheld against creditors whether their claims accrued prior or subsequent to the transfer."

Points decided.

(Wait's Fraudulent Conveyances, § 99.) Other authorities sustain the same proposition. (*Iley v. Niswanger*, 1 McCord Ch. 519; *Beach v. White*, Walk. Ch. 496; *Herschfeldt v. George*, 6 Mich. 456; *Hurd v. Courtenay*, 4 Met. [Ky.] 139; *Lowry v. Fisher*, 2 Bush, 70; *Ridgeway v. Underwood*, 4 Wash. C. C. 129.)

In *Ridgeway v. Underwood*, *supra*, Judge Washington cites numerous authorities on this subject, and concludes that "if the grantor, at the time the deed was made, was indebted to the extent of insolvency, or perhaps of great embarrassment, so as to create a reasonable presumption of fraudulent design, the deed may be impeached by a subsequent creditor, unless the presumption is repelled by showing that such prior debts were secured by mortgage or by a provision in their favor in the deed itself." To the like effect is 1 Am. Lead. Cases, pp. 43, 44; *McElwee v. Sutton*, 2 Bail. 128; *Madden v. Day*, 2 Bail. 575; *Smith v. Lowell*, 6 N. H. 67; *Parkman v. Welch*, 19 Pick. 231. The Statute of 13 Elizabeth, chapter 5, protects creditors and others. This provision is incorporated in the Code (§ 3059), and it has always received a liberal construction in allowing to persons who are, or might be, injured by a fraudulent conveyance the character of *creditors*. (1 Am. Lead. Cases, 45.)

For the reasons here given I am unable to concur in the conclusions reached by my brethren. I think the plaintiff, both upon the facts and the law, is entitled to the relief prayed for.

[Filed May 17, 1888.]

J. W. RAYBURN, APPELLANT, v. J. J. WINANT AND
WILLIAM HOAG, RESPONDENTS.

IN THE CONSTRUCTION OF A DEED to land, the intention of the grantor, ascertained from the various parts of the instrument, taken as a whole, will control the inference to be drawn from general language employed in the description of the courses and distances of the boundary, as to the premises conveyed.

BOUNDARY IN DEED.—Where a grantor in a deed clearly evinced an intention to convey the one half of a distinct tract of land, which bordered on tide-water, and the boundary of the moiety was described in the deed as com-

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mening at a certain stake on the south, and running due north to a stake on the north line of said tract; thence west along said line to the corner; thence south to the southwest corner; thence east to the place of beginning; and it appeared that said southwest corner was at the meander line of such tide-water; *held*, that it must be presumed that the beginning point of the boundary was upon said meander line, and that the course from the southwest corner to that point was intended to be along such meander line, and not on a direct line between those points, the said meander line being the south boundary of such half.

WHEN THE BOUNDARIES IN A DEED ARE INCONSISTENT, the uncertain must yield to the certain description; but when the doubt is as to the accuracy of the particular description, the use which is general often becomes important, and renders that clear which without it would be obscure and uncertain. (Per LORD, C. J.)

BOUNDARY—MEASUREMENT.—In taking distances from one point to another on navigable water, the measurement is by its meanders, and not in a direct line. (Per LORD, C. J.)

APPEAL from Benton County. Affirmed.

John Kelsay, for Appellant.

J. R. Bryson, Wallis Nash, and L. Flinn, for Respondents.

THAYER, J.—This was a suit in the said Circuit Court, brought by the appellant against the respondents to compel a conveyance from the latter to the former of a parcel of land described in the complaint as bounded by the following lines: Beginning at a point 25.60 chains west from the quarter section corner on the line between sections 26 and 27, and south 22.60 chains to high-water mark in Yaquina Bay; thence due west to the southwest corner of lot number 5; thence east with the meanderings of said Yaquina Bay to the place of beginning; all in section 27, T. 11 S., R. 11 W., W. M., situated in said county of Benton.

The parcel of land contended for, as will be noticed, is the land between the initial part of the above boundary and the southwest corner of said lot numbered 5, which is included between a straight line from and to those points and the meander line of said bay; both points are in the said meander line, and if that is a straight line between them, then there is no land there to dispute about. The appellant's counsel, however, claim that the main-land between the said points extends into the bay, and

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in consequence of which there are several acres of it included between the two lines; but no survey thereof is shown by the evidence to have been made, and we have no means of knowing the approximate quantity. This land belongs to a tract which was originally entered in the land office at Oregon City, Oregon, by one Solomon Dodge, and which was called by him and others "the Oysterville claim." The whole tract includes 164.61 acres.

The said Solomon Dodge, it appears, died, and the claim was patented by the United States to his heirs; and that his widow, Lydia P. Dodge, was his sole surviving heir. It further appears that the said widow, Lydia P. Dodge, on the eighteenth day of January, 1871, executed under her hand and seal, duly witnessed and acknowledged, a deed of grant, bargain, and sale, whereby she conveyed to Ben Simpson and E. D. Thorn, in consideration of the sum of \$205.75, paid her by them, the following described premises, to wit: That piece or parcel of land known as the west half of the Oysterville claim of 164.60 acres, situated on the Yaquina Bay, in the county of Benton and State of Oregon, and more particularly described in certificate No. 860, receiving office at Oregon City, dated December 13, 1870. Commencing at a stake twenty (20) rods west of the Oysterville House, formerly owned and occupied by Solomon Dodge, and running due north to a stake on the north line of said land claim; thence west along said line to the corner; thence south to the southwest corner; thence east to the place of beginning, making 82 acres more or less. The patent, it appears, was issued upon examined certificate No. 860.

It further appears that subsequently, and in August, 1871, the said Lydia P. Dodge having intermarried with Abiathar Newton, she and her husband, in consideration of \$250, paid them by the respondent, James J. Winant, executed under their hands and seals, duly witnessed and acknowledged, a deed whereby they remised, released, and quit-claimed unto the said Winant, all their right, title, and interest in and to the entire tract of land or claim, described as lot number 1 of section 26, lots 5, 6, and 7, and the northeast quarter of the southeast quarter of section

27, in T. 11 S., R. 11 W. of the W. M., in the county of Benton and State of Oregon. That subsequently, and on the fifteenth day of January, 1883, the said Ben Simpson and E. D. Thorn duly executed to the respondent, W. M. Hoag, a deed to the same premises, and containing the same description of that included in the deed to them by the said Lydia P. Dodge. Subsequently, it would seem, that the appellant, conceiving the idea that Lydia P. Newton, formerly Lydia P. Dodge, still owned the piece of land in controversy, induced her and her husband to execute a deed to said land, together with a part of the entire claim, to his sister, Ella J. Rayburn, and afterwards took a deed from her to himself of the same premises. He was conscious, it seems, that the deeds to Simpson and Thorn and to Winant conveyed the entire claim; and to obviate that result it was necessary to establish that Mrs. Dodge-Newton had conveyed to Winant land which she did not intend to; and hence the claim of mistake alleged in the complaint is set up. It is very evident that said grantor intended to convey to the respective grantees named her entire interest in said claim, and if, therefore, she made any mistake, it consisted in conveying to Simpson and Thorn less land than she intended, and to Winant more; but I am unable to discover how there could have been any mistake in the latter case, as the deed to Winant was a mere quit-claim. Her deed to Simpson and Thorn purported to convey one half of the claim; and the one to Winant had the effect to convey to him the residue.

A quit-claim deed operates to convey all the interest in the premises described therein, which the grantor has the lawful right to convey. The mistake, if there was any in the quit-claim deed, must consist in this, that Mrs. Newton intended to convey to Winant the east half of the claim, and as her deed to Simpson and Thorn only conveyed to them the part thereof included within the exterior lines of the boundary mentioned in the deed, literally interpreted.

The land in question was not conveyed to them, and consequently was conveyed to Winant. But under that view, how can we give full meaning to the expression, "the west half of

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the Oysterville claim of 164.60 acres," contained in the Simpson and Thorn deed? The appellant's counsel, however, in order to avoid the embarrassment which a candid answer to the inquiry would cause, contend that the tract of land was not generally and publicly known as "the Oysterville claim," and that the use of that term in the deed, therefore, as descriptive of the premises, conveyed no definite idea. But it will be observed that the deed states what the claim is; the description does not stop by the mere use of the term referred to, it gives its acreage, says that it is situated on Yaquina Bay, etc., and further, that it is more particularly described in certificate No. 860, receiving office at Oregon City, dated December 13, 1870. Said certificate is evidently "examined certificate 860," upon which the said patent was issued.

I am unable to discover how any more definite description of the land intended to be conveyed to Simpson and Thorn could have been employed than that contained in the said deed. The land described in the patent must be the land embraced in said certificate, and it was the west half thereof, containing 82 acres, more or less, which was intended to be conveyed; its boundary is given, and if there is any discrepancy between it and the distinct parcel of land which the deed shows was intended to be conveyed, the latter must control. There is, however, no discrepancy in that respect, if the words employed in designating the boundary are fairly construed. The initial point is a stake 20 rods west of the Oysterville House, formerly owned and occupied by Solomon Dodge. It is not definitely stated that the stake was at high-water mark on the bay, but the presumption is that it was.

In giving a description of land in a deed by metes and bounds, parties would not be liable to begin inside of the exterior lines. The first course from the stake is due north to a stake on the north line of said land claim; thence west along said line to the corner; thence south to the southwest corner; thence east to the place of beginning. It is not stated that the last course was along the meander line of the bay; but it would be absurd in the highest degree to suppose, in view of the other parts of the description of the premises conveyed, that any other

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course was intended. The first course was due north, between two given points; the second and the third were along the north and west boundaries of the claim; and to conclude that the fourth was intended to be a fixed arbitrary line, to be run irrespective of the south bounds of the claim, and so as to leave a small portion of the west half thereof between it and the meander line of the bay, would be a sad comment upon the reason and sense of the parties, and render the description in the deed inconsistent with itself.

It is very apparent that Mrs. Newton thought she had disposed of her interest in the entire claim; she had sold the west half of it to Simpson and Thorn, the residue to Winant; had surrendered up possession of it to the purchasers, moved away, and had gone more than a dozen years, and would probably have remained in blissful ignorance to the contrary if she had not been graciously informed that she was still the owner in fee-simple of a part of it, for which she could realize twenty dollars. It must, however, be said to the credit of the old lady that she disclaimed such ownership, and was not induced to execute the deed for a money consideration. Contingent interests of that character are seldom first discovered by those to whom they are supposed to belong. They are more often found out by the active, the vigilant, and the fool-hardy. Such interests are generally more highly appreciated and eagerly sought after, on account of their fruitfulness in producing wrangles, contentions, and conflicts regarding veracity than for any intrinsic value they possess. They may develop shrewdness and ingenuity, and afford excellent opportunities to practice sophistry, and to exhibit skill in drawing fine spun hair-splitting distinctions; but they are not usually profitable investments, and it would be better for the community if members of the bar would avoid engaging in such schemes. Buying lawsuits, at common law, was regarded as unlawful, and even in this age of rapacity and greed is not considered as altogether reputable.

The degree appealed from will be affirmed.

LORD, C. J., concurring. — It is no doubt true, as argued by counsel, that where a deed contains two descriptions, one definite

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and particular, showing the precise location of the land, and the other vague and in general terms, the former will control the latter. The reason is, such boundaries being inconsistent and irreconcilable, the uncertain must yield to the certain description. But when doubt arises as to the accuracy of the particular description, the one which is general often becomes important, and renders that clear which without it would be obscure and uncertain. These are elementary rules of construction, and only resorted to when required by the necessities of the case, and then simply to aid in ascertaining the intention of the parties from the deed itself as to the property meant to be conveyed by it. There can be no doubt as to what was meant by the "west half" of the claim in dispute.

The eastern course of the original donation claim is the meander of the Yaquina River, and the "west half," or one half of it, cannot be conveyed, by adopting the lines of the original survey, without making "east to the place of beginning" the meander of said river. The line thus described is the southern boundary, and necessarily, by the adoption of the courses and lines of the original survey, explains the direction of that line to the place of beginning to be the meander of the river. This is not only consistent with the manifest intention on the face of the deed, but it identifies both descriptions as conveying the same land, and removes all appearance of incongruity. Besides the rule is, in taking the distance from one point to another on a navigable river, the measurement should be by its meanders, and not in a direct line.

In *People v. Henderson*, 40 Cal. 32, Temple, J., said: "There seems to be no conflict whatever in the authorities, that where a certain distance is called for from a given point on a navigable stream to another point on the stream, to be ascertained by such measurement, the measurement must be made by its meanders and not in a straight line, and the same rule prevails where distance is called for upon a traveled highway." There is no incongruity in the descriptions except to apply a technical rule in a case where none is needed. I therefore concur in affirming the judgment.

STRAHAN, J., did not sit in this case, having been of counsel therein.

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[Filed May 21, 1888.]

GRANT L. ROHR, RESPONDENT, v. C. F. PEARSON,
APPELLANT.

PARTNERSHIP ACCOUNTING—DUTY OF PARTNER KEEPING ACCOUNTS AND HANDLING FUNDS.—Where it appears that the defendant kept all the books of a firm and kept the bank account of the firm in his own name, *held*, that this imposed upon him the duty of making a full and complete showing of all the affairs of the firm, and of demonstrating every item of account so clearly as to leave no question about the same.

PATENT RIGHTS—USE OF, IN FIRM'S BUSINESS—NO IMPLIED CONTRACT TO PAY.—Where the defendant claimed an allowance for the use by the firm of certain patent rights, and the utility of the same is in doubt, and it appears that he voluntarily made use of them in occasional business of the firm without any understanding or expectation that he should be paid for the same, the claim was disallowed.

ACCOUNTS—ALTERATION OF, AFTER SUIT.—Where the defendant after the commencement of the suit made an additional charge for time lost in the business of the firm to what had been by him previously charged on the books of the firm for the same loss, *held*, that it was properly disallowed.

APPEAL from Multnomah County. **Affirmed.**

Jos. Simon, and J. C. Moreland, for Appellant.

George W. Yocum, for Respondent.

STRAHAN, J.—The object of this suit is to dissolve the copartnership heretofore existing between the plaintiff and the defendant, and for an accounting. The cause was referred to Henry E. McGinn, Esq., to take the evidence and report his findings of law and fact. Upon the referee's report being filed the same was confirmed by the court, and a final decree entered thereon in favor of the plaintiff, from which decree the defendant has appealed to this court. It is not in accordance with the practice of this court upon an appeal like this to re-examine every item of account between the parties during the existence of the partnership. Such a course of procedure here is ordinarily impracticable. We endeavor to re-examine only those items that rest upon some disputed or controverted question of fact or law.

Upon this appeal, the plaintiff has presented a carefully prepared statement, embracing all of the items of account between

the parties that are controverted on either side; but we are unable to see that the referee failed to find according to the preponderance of the evidence upon those items.

The defendant insists that he ought to be allowed twenty-five dollars per month for the use of a certain patented process for graining, and twenty dollars per month for a certain other patented process for painting roofs, which were owned by him and used by the partnership in its business. This claim was disallowed by the referee, and properly. The actual utility of those inventions seems to be left in doubt by the evidence; but aside from this, it sufficiently appears that the defendant voluntarily used those processes occasionally in the work and business of the firm, without any understanding or even expectation that he should be paid for the same.

The defendant's counsel claim that there is an error of some six hundred dollars in the finding of the referee against the defendant which this court ought to correct. No doubt if there is an error it ought to be corrected, but we think the error alleged does not appear. The defendant kept the books and received and disbursed all the money of the firm during its existence, and he ought, therefore, to be able to demonstrate every item of account so clearly as to leave no question about it. Instead of that, however, numerous errors appear to exist in his accounts, innocently, it may be, but in most instances they are in his favor and against the plaintiff. Another gross irregularity in the business methods of the defendant was his manner of handling the funds of the firm. The firm's bank account was kept in his individual name, and all checks thereon were drawn by him in his own name, and not in the name of the firm. It is probable that all of this occurred without any real intention on the part of the defendant to wrong the plaintiff, at least, it does not directly appear that he had such intention; but it certainly imposed upon him the duty of making a very full and satisfactory statement and showing of all of the affairs of the firm. He ought to remove doubts and clear away difficulties. It is probable the referee did not apply so rigid a rule, though he might have done so. His conclusions are readily sustained without it.

Argument for Appellant.

The defendant claimed \$411.75 against the plaintiff for lost time in the business of the firm. Of this amount the referee allowed \$220. This was the amount charged in the company's books by the defendant against the plaintiff for time lost by the plaintiff, and no sufficient reason is shown for increasing it. It is true the defendant made an additional charge for the same loss, but it was made after this suit was commenced, and under the facts disclosed, we do not think it ought to be allowed.

Our conclusions lead to an affirmance of the decree, and it is so ordered.

[Filed May 24, 1888.]

MARGERY HERBERGER, RESPONDENT, v. JOHN HERBERGER, APPELLANT.

16	327
129	303
16	327
45	357

DIVORCE—CRUEL AND INHUMAN TREATMENT.—Divorce granted where it appeared that on one occasion defendant forcibly ejected plaintiff from his bed, and afterwards used violence upon her person, and on one or two other occasions used violence towards her, and that he accused her of adultery, and unsuccessfully attempted to prove upon the trial that she was guilty of the accusation.

EVIDENCE—ADULTERY—WHAT NOT SUFFICIENT.—Proof that the persons accused of adultery, a niece and uncle, maintained the usual and common amenities between like relations in their condition and situation, and had opportunities and might have committed the crime, is not sufficient to establish it. Where circumstances are relied upon they should lead to the conclusion of adulterous intercourse as a necessary conclusion.

APPEAL from Grant County. **Affirmed.**

C. A. Sweek, Clifford & Williams, and Ramsey & Bingham,
for Appellant.

The testimony in the case is clearly insufficient. Whether the acts constitute cruelty depends on the circumstances, the *animus*, and the sensitiveness of plaintiff. (*Adams v. Adams*, 12 Or. 180.) An assault or slap of the hand in a single instance, occasional turbulence, rudeness of language, etc., insufficient. (1 Bishop on Marriage and Divorce, § 747; *Morris v. Morris*, 14 Cal. 76; 73 Am. Dec. 615.) To establish adultery, direct evidence is not necessary. Circumstances which combined tend

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to establish lustful disposition of the parties, and the opportunity to commit the act, are sufficient. (Abbott's Trial Evidence, 744; *Westmeath v. Westmeath*, 2 Eng. Ecc. 438; *Inskeep v. Inskeep*, 5 Clarke, 204; *Taylor v. Taylor*, 11 Or. 303.) This case is similar to *Boon v. Boon*, 12 Or. 437.

Richard Williams, for Respondent.

STRAHAN, J.—This is a suit for a divorce, and for such further relief as may be incident thereto. The main causes relied upon by the plaintiff are cruelty and personal indignities rendering her life burdensome. I think it sufficiently appears from the evidence that on one occasion the defendant used force in ejecting the plaintiff from his bed; that he followed her out and used some violence upon her person afterwards, and that he was very angry at the time. It also appears that on one or two other occasions the defendant used violence toward the plaintiff. The accusations of adultery seem to be very fully established. In fact, it is admitted by the answer that the defendant accused the plaintiff of the crime of adultery; but it is added in mitigation that he did so by way of remonstrance. But aside from the admission contained in the answer, the defendant undertook to prove upon the trial that the plaintiff had been guilty of adultery with her uncle, one B. C. Trowbridge. To this one point the greater portion of the defendant's evidence was directed. A somewhat careful review of all of the evidence does not lead to this conclusion; but on the contrary, it only tends to prove and establish that these parties kept up and maintained the usual and common amenities of social life between like relations in their condition and situation. Because they were sociable the court will not presume evil, and because they had the opportunity and might have committed adultery, there is no presumption that they did. The presumptions are the other way. The law will not presume that these parties violated the criminal statutes of the State, and transcended their social duties, or were guilty of any wrong. He who alleges it must prove it; opportunity alone will not suffice. (*Pollock v. Pollock*, 71 N. Y. 137.) Of course, direct proof is rarely attainable, and is not

Points decided.

necessary; but where circumstances are relied upon they ought to be such as to lead to the conclusions of the adulterous intercourse, not only by fair inference, but as a necessary conclusion. Appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. (*Pollock v. Pollock, supra.*) But in this case there is not enough to require the rule to be invoked. There is nothing but the vaguest, and so far as appears, the most unreasonable and groundless suspicion. This case clearly falls within *Smith v. Smith*, 8 Or. 100, and *McMahon v. McMahon*, 9 Or. 525.

The decree of the court below must therefore be affirmed.

[Filed June 7, 1888.]

I. W. CASE, RESPONDENT, E. A. NOYES, GARNISHEE,
APPELLANT.

REMEDY—GARNISHMENT.—The remedy by garnishment is surely statutory, and to make it available the essential requisites of the statute must be complied with.

GARNISHEE—SERVICE OF ALLEGATIONS AND INTERROGATORIES.—After a garnishee has been required to appear and answer, and before the day fixed for that purpose, or within a time to be specified in the order, the plaintiff may serve upon him written *allegations* and interrogatories, and without such *allegations* there is no foundation for any further proceedings against such garnishee.

ALLEGATIONS—AGAINST GARNISHEE.—The allegations provided by the Code were designed to enable the plaintiff to bring upon the record the cause of action which the original defendant had against the garnishee, and to which the plaintiff has become subrogated by virtue of the attachment.

INTERROGATORIES—ANSWERS.—The answers which the garnishee is required to make to the interrogatories which must be served with the allegations were designed to further aid the plaintiff in bringing distinctly and clearly before the court the facts in relation to the property attached in the hands of the garnishee, and might be used as evidence upon the trial against the garnishee.

GARNISHMENT—MODE OF TRIAL.—Proceedings against a garnishee on an attachment or execution issued in an action at law is strictly a proceeding at law, and the mode of trial is the same as in an action at law. It is in no sense equitable, and the mode of trial in a suit in equity cannot be resorted to.

APPEAL from Clatsop County.

Fulton Brothers, for Respondent.

C. H. Page, Raleigh Stott, and C. B. Bellinger, for Appellant.

16	329
23	211
23	601
19*	104
31*	399
32*	756

16	329
31	102
16	329
37	336
38	112

16	329
40	277

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STRAHAN, J.—It appears from the transcript in this case that on the twenty-third day of December, 1885, the respondent commenced an action in the Circuit Court of Clatsop County, Oregon, against the Sea Side Packing Company, a private corporation, and William Kyle, on a promissory note payable to Kyle for \$637.50, and by him indorsed to the plaintiff. The plaintiff on the same day caused a writ of attachment to be issued in said action and served the same on the appellant Noyes, with notice that any money or property in his hands belonging to the packing company was attached, and requiring him to make a certificate of such money or property. The garnishee made return that he did not have in his possession any money or property of any kind belonging to the packing company. On the thirty-first day of December, 1885, the plaintiff filed his petition showing the foregoing facts, and alleged that the statement and certificate made by Noyes was unsatisfactory to him, and alleged therein that he had in his possession at the time the writ was served one thousand dollars, the property of the packing company, and asking that an order be made requiring Noyes to appear before the court and be examined concerning the same.

Based on said petition the circuit judge made an order requiring Noyes to appear before the Circuit Court of the State of Oregon, for the county of Clatsop, on the eleventh day of January, 1886, at the hour of eleven o'clock of said day, then and there to answer under oath concerning his indebtedness to the Sea Side Packing Company, and concerning any goods, chattels, credits, or property he had in his possession or under his control, owing or belonging to it, on the said fifth day of January, 1886. On the eighth day of January, 1886, the plaintiff caused six interrogatories to be served upon the garnishee, and on the eleventh, Noyes answered said interrogatories. On the same day on motion of plaintiff's attorneys it was ordered by the court that this cause be referred to C. R. Thompson, to take and report the testimony of the court at the next term.

The time for taking the evidence was extended from time to time till May 1, 1887. On the fifth day of October, 1887, by stipulation of the parties, the plaintiff was allowed to file a sub-

stituted reply to the answer of said garnishee as a substitute for the original reply which had been lost. This reply is to each and every answer of said garnishee, E. O. Noyes, to interrogatories numbered 1, 2, 3, 4, and 5, and it says said answers are not true, and it denies the same. The reply to the answer to interrogatory 6 is a narrative statement.

The circuit judge made and filed a number of findings, and on the thirteenth day of September, 1887, in vacation, entered a final judgment against the garnishee for five hundred dollars, from which he has appealed to this court. The appellant in his notice of appeal assigns numerous errors, only a part of which will be noticed. One assignment is: The interrogatories and allegations in said cause did not state or charge a cause of action. The proceeding by process of garnishment is purely statutory, and to give it any validity the substantial and essential requirements must be complied with.

After the allowance of the order and before the garnishee shall be thereby required to appear, or within a time to be specified in the order, the plaintiff may serve upon such garnishee written *allegations* and interrogatories touching any of the property liable to attachment as the property of the defendant, as provided in subdivision 3 of section 149, and to which such garnishee is required to give a certificate as provided in section 152, Oregon Code. Sections 164 and 165 of the Code make it the duty of the garnishee, on the day when he shall be required to appear before the court or judge thereof, to return the *allegations* and interrogatories of the plaintiff to the court or judge with his written answer thereto, unless for a good cause shown a further time be allowed. Such answer shall be on oath, and shall contain a full and direct response to all the *allegations* and interrogatories. Sections 166, 167, and 168 relate to the further procedure and the formation of issues to be tried between the plaintiff and the garnishee, and the issues arising thereon shall be tried as ordinary issues of fact between plaintiff and defendant.

1. The plaintiff by this proceeding against Noyes as garnishee is endeavoring to assert the rights of the Sea Side Packing

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Company against him, and he can assert no other rights unless it appeared that the garnishee had effects of the defendant which he held fraudulently. (Drake on Attachments, § 458; *Oregon Ry. & N. Co. v. Gates*, 10 Or. 514; *Baker v. Elgin*, 11 Or. 333.) And the same doctrine is stated with more directness and particularity by Waples on Attachment, page 343. He says: "The plaintiff virtually sues the garnishee for a debt due the defendant by the process of garnishment. He takes the shoes of the latter and asserts the rights which the latter has against a third person. He has to make out the case against the garnishee (when he is permitted to do so), unless the indebtedness to the defendant be admitted by the garnishee." At page 347, the same author says: "The plaintiff is legally (though hypothetically) subrogated to the right of action which his debtor has for the recovery of property or credits due the debtor. He sues for such property or credits in his own name, but upon the cause of action acquired by such legal subrogation. He can recover no more than his debtor might have recovered. . . ."

These elementary citations sufficiently show the nature of this proceeding, and in some measure indicate what would be necessary to its successful prosecution. Under the Code the plaintiff in the original action by the process of garnishment becomes a plaintiff or actor against the garnishee. If the certificate which the garnishee is required to give proves unsatisfactory to the plaintiff, thereafter the proceedings by the plaintiff are in the nature of an action and strictly adversary. The *allegations* provided by the Code are designed to enable the plaintiff to bring upon the record the cause of action which the original defendant had against the garnishee, and to which the plaintiff has become subrogated by virtue of the attachment. Said *allegations* must therefore contain the essential elements of a good cause of action against the garnishee, and which existed in favor of the defendant at the time of the garnishment. The interrogatories and answers thereto are simply designed to assist the plaintiff in making proof of such cause of action as is contained in his allegations against the garnishee. The cause of action which the plaintiff acquires by virtue of the garnishment includes

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the right to reach by the process every attachable interest mentioned in subdivision 3, section 149 of the Code belonging to the defendant in the action. Of course the garnishee may at once relieve himself by transferring or delivering the property or paying the debt to the sheriff.

2. The remedy by attachment and garnishment is purely statutory, and to make them available to a party the substantial requirements of the statute must be complied with. The court has no power to enlarge or extend them beyond the letter of the statute. (2 Wade on Attachment, § 333; Waples on Attachment, pp. 24, 321.)

3. In this case no *allegations* whatever were served or filed. This essential and fundamental requirement could not be omitted or neglected by the plaintiff. Without such allegations there is nothing in the case requiring an answer from the garnishee, or upon which a judgment could be rendered against him.

4. Something was said upon the argument as to whether this proceeding is in the nature of an action at law or a suit in equity. The evidence is in writing and accompanies the transcript, and it was suggested we might examine and retry the questions of fact. The conclusions reached render it unnecessary to decide this question; but we may as well add that in case of a garnishment, whether upon an attachment or execution in an action at law, the proceeding is strictly at law and not in equity, and the issues of fact arising therein shall be tried as ordinary issues of fact between plaintiff and defendant (Or. Code, § 168.)

The judgment rendered against the garnishee must therefore be reversed and the cause remanded, with directions to discharge him.

NOTE. — For petition on rehearing, see page 539.

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[Filed June 7, 1888.]

G. F. BEERS, APPELLANT, v. DALLES CITY,
RESPONDENT.

16 334
20 350
18* 335
25*1020

16 334
41 292

CORPORATION—POWERS—CHARTER.—A corporation being the creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.

CHARTER OF DALLES CITY—POWER OF COUNCIL—SEWERS.—Section 63, Acts of 1880, page 1, incorporating Dalles City, confers upon the common council of the city power without limit or restriction to establish a system of sewerage, and to construct and repair drains and sewers.

STATUTORY CONSTRUCTION—SECTIONS 63 AND 91.—These sections relate to the same subject and must be construed together. Under section 63 the council might exercise the power in any suitable manner, and the expense would be payable out of the general fund of the city; but section 91 enables the council in its discretion to charge the costs of drains and sewers upon the property directly benefited. If the council fail to exercise this discretion and to charge the expense on the property, it is payable out of the general fund.

MUNICIPAL CORPORATION—POWER—HOW EXERCISED.—When the common council of a municipal corporation is vested with full power over a subject, and the mode of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient. In such case the corporation may act by its officers or properly authorized agents, and make contracts to carry into effect the granted powers the same as individuals.

MUNICIPAL CORPORATIONS—LIABILITY.—Unless prohibited by its charter, a municipal corporation is liable when a person is employed for it by one assuming to act in its behalf, and such person renders the services according to the agreement, with the knowledge of its officers, and without notice that it is not recognized as valid and binding.

SECTION 128 OF THE CHARTER—ORDINANCE—CONTRACT IN WRITING.—The application of this section is limited to those cases where the power of the corporation must be exercised by ordinance under the charter, and where the work must be let to the lowest responsible bidder after notice. It does not apply to cases where the council is directly authorized to do the work without the formality of entering into an express contract.

On Rehearing.

PLEADING—MATERIAL FACT NOT ALLEGED.—An answer constitutes a part of the record on appeal, and on demurrer its sufficiency must be determined by the facts set forth, and it cannot be aided or supported by extrinsic facts.

CHARTER—CONSTRUCTION OF THE TERM "CONTRACT."—The term "contract," used in section 128 of the charter of Dalles City, must be construed to mean such contracts as are named in other sections of the charter, when an ordinance and notice are necessary prerequisites to create a legal liability against the city.

APPEAL from Wasco County.

Bennett & Wilson, for Appellant.

W. Lair Hill, F. P. Mays, and Atwater & Story, for Respondent.

Opinion of the Court—Strahan, J.

STRAHAN, J.—This is an action against Dalles City to recover for the services of certain laborers employed by the street commissioner, which labor was performed in laying down a certain sewer within the corporate limits of said city. The amended complaint, after alleging that the defendant was a municipal corporation at and during all the times thereafter stated, alleges that during the month of May, 1884, one W. F. Butts, the street commissioner of the defendant corporation, acting by, through, and under the directions and authority of the defendant, expressly given and commanded, employed for the defendant certain laborers to perform work and services for the defendant in laying down a certain sewer within the corporate limits of the defendant corporation, which said laborers performed work and services thereon for the defendant of the reasonable value and the agreed price and amount of \$273.75, which work, labor, and services, the defendant accepted and received, and in order to satisfy and pay said laborers for said labor and services ordered that orders or warrants be drawn upon the treasurer of the defendant corporation therefor, and in pursuance thereof two orders or warrants were made, executed, and delivered to the said W. F. Butts, of which the following are substantial copies:—

“Class 2, number 942, \$271.

“DALLES CITY, OREGON, May 30, 1884.

“*Treasurer of Dalles City*: Pay to W. F. Butts, or bearer, two hundred and seventy-one dollars, general fund Union Street sewer. By order of the city council.

“GEO. A. LEIBE, Mayor.

“T. A. HUDSON, Recorder.”

Another order for \$102.75, dated May 31, 1884, is then set out, and the complaint proceeds: “That immediately thereafter said orders or warrants were presented to said treasurer and payment thereof demanded, which was refused for want of funds, and thereupon said warrants were, for a valuable consideration, to wit, the sum of \$273.75, in lawful money of the United States, assigned and transferred to this plaintiff, who is now the

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owner and holder thereof." It is then alleged that said sum of \$273.75 was paid to said laborers in satisfaction for said work, labor, and services so performed for said defendant, and that said defendant received the benefit thereof; and said Butts in the whole of said transactions acted for the defendant and under its directions.

Many of the material allegations of the complaint are denied by the answer, and then said answer states: "That the alleged work and services referred to in said amended complaint, and which are sought to be charged to the defendant, if the same or any part was performed, was not let to the lowest or any bidder, and was unauthorized by the defendant, and that no contract authorizing the same, or any part of it, was ever authorized by ordinance or made in writing, and by order of the council of the defendant, signed by the mayor or recorder on behalf of the defendant, and no ordinance was ever passed by the defendant authorizing said W. F. Butts, or any other person or persons, to contract for or bind the defendant without a contract in writing for said alleged work or services, or any part of either, and no contract in writing was ever authorized or made in any way by the defendant concerning any of the matters alleged in said amended complaint, and no ordinance was passed by the defendant appropriating or in any way providing for the payment of said alleged \$273.75, or any part of it, or for the payment for said alleged work and services, or for any part of either; and that the two alleged orders or warrants copied in complaint; was each drawn by the mayor and recorder of the defendant without any authority whatever from the defendant, and without any ordinance of the defendant directing such action, and without any appropriation made therefor, and was to pay for the alleged work and services, which if performed at all were performed without any authority from or any contract with the defendant whatever."

The plaintiff demurred to the new matter in the answer, on the ground that the same was not sufficient to constitute a defense; which demurrer was overruled, and the plaintiff failing to plead further to said new matter in the defendant's answer, on motion

the court gave final judgment in favor of the defendant for its costs and disbursements, from which this appeal is taken.

The plaintiff in his notice of appeal assigns two grounds of error, upon which he intends to rely upon the appeal: *First*, error of the court in overruling said demurrer; *second*, error of the court in granting the defendant's motion for judgment. These two assignments practically present but one question, and that is whether or not the new matter pleaded in the answer constituted a defense.

1. A municipal corporation is called into being by the State for its own purposes, and it is endowed with that measure of power and authority which the act creating it confers, and such implied power and none other as is necessary to carry into effect the powers which are expressly enumerated and delegated to it. In *Dartmouth College v. Woodward*, 4 Wheat, 636, Chief Justice Marshall, with great force and clearness, defined a corporation thus: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." A brief reference to the powers and limitations imposed upon the defendant is therefore necessary to determine the extent of its liability and the measure of its duty. Section 63 of the charter is as follows:—

"Sec. 63. The council is authorized and empowered to lay out, establish, vacate, widen, extend, and open streets, or parts of streets, and alleys, and parts of alleys, in said city, and appropriate private property for that purpose, and to establish or alter the grade of any street, or part thereof, and to improve the sidewalks, pavements, streets, and parts of streets, within the city limits, making full or partial improvements thereof, and to establish a system of sewerage, and to construct and repair drains and sewers; and it has full power to determine and provide for everything necessary and convenient to the exercise of the authority herein granted."

"Sec. 64. No improvement mentioned in section 63 can be undertaken or made without fourteen days' notice thereof, being

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first given by publication in a newspaper published in Dalles City, except as in this act otherwise provided."

Section 65 provides how the notice must be given, and that it must specify with convenient certainty the street, or part thereof, proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made. Section 66 authorizes the owners of two thirds of the property adjacent to such street, or part thereof, within fourteen days from the final publication of the notice, to file with the recorder a written remonstrance against the proposed improvement, grade, or alteration thereof, and thereupon the same shall not then be further proceeded with or made. Section 67 authorizes the council, within six months from the final publication of notice, if no such remonstrance be made and filed, to establish the proposed grade, or alteration thereof, or to commence to make the proposed improvement as thereafter provided. Section 70 directs, when the probable cost of the proposed improvement has been ascertained and determined, and the proportionate share thereof has been assessed as provided in section 69, the council must declare the same by ordinance, and direct the recorder to enter a statement thereof in the docket of the city liens, as provided in the next section. Several succeeding sections define with particularity the method of enforcing such lien against property, and section 82 says: "Each lot, or part thereof, within the limits of a proposed street improvement shall be liable for the full cost of making the same upon the half of the street in front or abutting upon it." Section 86 provides that the council must provide by ordinance for the time and manner of doing the work on any proposed improvement, subject only to the following restrictions, viz: After proper notice the work must be let to the lowest responsible bidder, for either the whole work necessary to complete the proposed improvement, or for such subdivision thereof as will not materially conflict with the completion of the remaining portion; but no bid for a fractional part of any class of work, chargeable to any block fronting upon the street to be improved, shall be received, and a bid by the owner or owners of two

thirds of the property in a block fronting on a street proposed to be improved must be accepted; *provided*, that the same is as low as any other bid, and that the work can be so subdivided without injury to the owners of adjacent or other property. The balance of the section provides further details in relation to the bids. Section 87 provides, if upon completion of any improvement it is found that the sum assessed therefor upon any lot or part thereof is insufficient to defray the cost thereof, the council must ascertain the deficit, and declare the same by ordinance, and when so declared, the recorder must enter the sum of the deficit in the docket of city liens in a column reserved for that purpose in the original entry, with the date thereof, in like manner and with like effect as in case of the sum originally assessed, and shall also be payable and may be collected in like manner and with like effect as in the case of such sum so assessed. Section 88 provides for a return of the money to the property owner in case more is collected than is necessary to pay for the improvement, and section 89 declares that all money paid or collected upon assessments for the improvement of streets shall be kept as separate fund, and in nowise used for any other purpose whatsoever, and that moneys assessed shall bear interest at legal rate till paid. Section 91 is as follows:—

“Sec. 91. The council shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer; but the mode of apportioning estimated costs of improvements of streets prescribed in sections 82 and 83 of this act shall not apply to the construction of such sewers or drains, and *when the council shall direct the same to be assessed on the property directly benefited*, such expense shall in every other respect be assessed and collected in the same manner as provided in case of street improvements; *provided*, that the council may in its discretion appoint three disinterested persons to estimate and determine the proportionate share of the cost of such sewer or drain, to be assessed to the several owners of the property benefited thereby.”

Section 92 empowers the council to *repair* any street, alley, drain, or sewer, or part thereof, whenever it may deem it expe-

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dient, and to declare by ordinance before doing the same whether the cost thereof shall be assessed upon adjacent property, or paid out of the general fund of the city; and if the council declare that a proposed *repair* shall be made at the cost of the adjacent property thereafter, the proposed repair is to be deemed an "improvement," and shall be made accordingly; but if it declare that the same shall be made out of the general fund, said repairs may be made as the ordinance may provide, and be paid accordingly; but it is provided that money shall not be paid out of the general fund for the purposes enumerated in the section, so long as there remains unexpended any portion of the revenue provided for in section 102 of the act. Section 128 of the charter is as follows:—

"Sec. 128. Dalles City is not bound by any contract, or in any way liable thereon, unless the same is authorized by ordinance, and made in writing, and by order of the council, signed by the mayor or recorder on behalf of the city. But an ordinance may authorize any officer or agent of the city, naming him, to bind the city without a contract in writing for the payment of any sum of money not exceeding one hundred dollars."

1. These are all of the provisions of the charter in any manner affecting the question presented by this record. They were evidently not drawn with as much care as is desirable, but it is believed the intent of the legislature is plainly expressed, and that is all about which the court has any concern. Section 63 confers upon the city council power without limit or restriction to establish a system of sewerage, and to construct and repair drains and sewers. The sections of the charter from 63 to 91 inclusive relate to the mode in which the power to establish, vacate, widen, extend, and open streets and alleys, and to establish and alter the grade of streets, and to improve sidewalks, pavements, and streets, shall be exercised, and the method of making and enforcing assessments to raise the requisite funds to pay for such improvements. The subject of sewerage is not mentioned in any of these intermediate sections, nor do the powers therein conferred relate to that subject. That entire subject is contained in sections 63 and 91 of the charter, and

those two sections must be construed together. By section 63 full power over the subject is conferred upon the council, without any provision as to the manner of its exercise or the method of raising money to pay for such sewers or drains. Under that section the council might exercise the power in any suitable way, and the expense would be payable out of the general fund of the city. But section 91 again declares the power of the council over this subject, and authorizes the council to assess the cost of such sewers or drains on the property directly benefited, but leaving it discretionary with the council whether it shall be so assessed or not. The words in this section, "and when the council shall direct the same to be assessed on the property directly benefited," must have the effect to leave it discretionary with the council whether it will make such direction or not. Unless these words are to have this effect, they perform no office in the sentence whatever.

2. Having reached the conclusion that the council has the power to lay down sewers and drains without making the cost thereof a charge upon the property, it becomes necessary to determine how this power may be exercised. Upon this subject both sections 63 and 91 are silent. No doubt under section 91, if the council should determine to make the cost of the sewer or drain a charge upon the property benefited, an ordinance would be the proper and perhaps the only appropriate way in which that could be done; but where the power relates simply to the laying down of a drain or sewer, it does not appear that an ordinance is necessary. The council having full power over the subject may exercise it in any manner that may be most convenient. It might appoint a committee of its own members to direct and superintend the work, or it might appoint or designate any other competent and suitable person to do it. "Public corporations may, by their officers and properly authorized agents, make contracts the same as individuals and other corporations in matters that *necessarily* appertain to the corporation; being artificial persons, they cannot contract in any other way. . . . " (1 Dillon on Municipal Corporations, § 455.)

3. The construction which has been given to the charter is

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decisive of this case, unless section 128, *supra*, limits or modifies the defendant's liability. I think that section was designed to apply to those cases, and only to those where an ordinance is required by the charter, and where the work is expressly required to be let to the lowest responsible bidder, after notice, as in section 86 of the charter. But in addition to this it seems that such a provision in the charter ought to be limited to executory contracts, and that it can have no application to a contract which has been completely executed on one side. In *Fister v. La Rue*, 15 Barb. 323, it was said: "It is well settled, at least in this country, that when a person is employed for a corporation by one assuming to act in its behalf, and goes on, renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized, and as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to the agreement. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was made by a person legally authorized to contract. This seems to me to be sound law and sound morality as well." To the same effect is *Pixley v. Western Pacific R. R. Co.* 33 Cal. 183; *Starkey v. City of Minneapolis*, 19 Minn. 203; *City of Cincinnati v. Cameron*, 33 Ohio St. 336; *Salomon v. U. S.* 19 Wall. 17.

4. This is not a case where the officers of a corporation have exceeded their authority as defined in the charter, nor is it a case where such officers have failed to pursue the requirements of the statute under which they were acting. It is admitted in such cases the statute must be strictly followed, and that a person who deals with a municipal body must see that its charter has been fully complied with. (1 Dillon on Municipal Corporations, § 463.) But the facts of this case do not bring it within these principles. Here the power in question was fully and plainly conferred, and there were no restrictions upon its exercise.

The facts pleaded in the answer, therefore, are insufficient to

constitute a defense, and the court below erred in overruling the plaintiff's demurrer thereto. Its judgment will therefore be reversed and the cause remanded, with directions to sustain the demurrer, and for such further proceedings as may be according to law and the practice of the court.

On petition for rehearing.

[Filed July 2, 1888.]

STRAHAN, J.—Counsel for respondent has filed a petition for a rehearing, in which it is said, in effect, that the common council of Dalles City did direct that in the particular case under consideration, the estimated cost of laying the sewers should be assessed on the property directly benefited. If this be true, the fact should have been distinctly averred in the answer.

It is of no consequence to recite the fact in this petition. The sole question is as to the sufficiency of the pleading demurred to, and that must be determined by what it contains, and it cannot be aided by any matters outside of such pleading. When this case shall be remanded to the court below, if that court shall be of the opinion that it would be in furtherance of justice to allow the answer to be amended so as to present the question raised by this petition for a rehearing, it will have the power to allow it; but it will rest entirely in the discretion of that court whether such amendment, if applied for, will be allowed or not.

On the second point presented by the petition I think the construction placed on section 128 must be adhered to. Any other would render it exceedingly difficult and inconvenient to conduct the affairs of the city. The common council would be compelled to devote much of its time to the consideration and passage of a great number of useless and unnecessary ordinances of no practical utility, on subjects where the business is now usually conducted, and under the direct supervision of the council, or a committee thereof, or by some officer or agent specially appointed for that purpose. Reading and construing the several sections of the charter together, I have no doubt the term "contract," as used in this section, means such contracts as are here referred to in other parts of the charter where ordinances and notices are

 Points decided.

specially required, and where an express contract must be entered into between the city and the contractor. The case of *Sylvester v. Dalles City* will be governed by this case.

Upon the record as presented there appears no sufficient cause for a rehearing, and it must be denied.

[Filed June 7, 1888.]

H. H. HAWLEY, APPELLANT AND RESPONDENT, v.
L. R. DAWSON, APPELLANT AND RESPONDENT.

PRACTICE—MOTION TO STRIKE OUT TESTIMONY.—A motion to strike out testimony is in the nature of a demurrer to the evidence, and must be tested by the same rules.

DEMURRER TO EVIDENCE—WHAT IT ADMITS.—The demurrer to evidence admits all that the testimony objected to has proved, and all that it tends to prove.

MOTION TO STRIKE OUT TESTIMONY WHEN PART ADMISSIBLE.—A motion to strike out the testimony of a witness cannot be sustained if any part of it is admissible.

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.—The objection that the contract sued on is an agreement to answer for the debt of another, and that it must be evidenced by writing, must be presented by an exception to the ruling of the court below either in the admission or exclusion of evidence, or the giving or refusing instructions, or by a demurrer in a proper case.

ESTOPPEL BY JUDGMENT ONLY OPERATES BETWEEN PARTIES AND PRIVIES.—There is no such privity between a sheriff and a plaintiff in an attachment as to render a judgment recovered against the sheriff by a keeper of attached property, for services as such keeper, a bar in favor of the plaintiff in the writ when sued on a contract to pay for another part of the same services. Estoppels by judgment only operate between parties and privies.

ATTACHED PROPERTY—KEEPER.—*Semble*, that when a keeper of attached property is necessary, his expense is in the nature of a disbursement, which the plaintiff in the writ might lawfully make, and tax the same in case he should prevail in the same way any other necessary disbursement is taxed in the action.

SHERIFF—NO LIABILITY FOR KEEPER'S SERVICES, WHEN.—By the employment of a keeper, a sheriff does not make himself personally responsible for his wages unless he shall expressly agree to pay the same. He acts for the benefit of the plaintiff in the writ, who may be called upon to advance the wages of a keeper.

PLAINTIFF'S APPEAL—CASE IN JUDGMENT.—Where the jury returned a verdict in favor of the plaintiff, and "assessed his damages at \$1,356, with interest thereon from September 29, 1885, to date, at eight per cent per annum, amounting in the aggregate to \$1,613.64;" *held*, that the court did not err in rendering a judgment for \$1,356.

APPEAL from Multnomah County.

G. H. Durham, and H. Y. Thompson, for Hawley.

16	344
24	535
18*	592
34*	355
16	344
33	83
133	381
16	344
47	34

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Cox, Smith & Teal, for Dawson.

STRAHAN, J.—The substance of the complaint herein is as follows: That at the special instance and request of the defendant, made by himself and his agents, duly authorized, the plaintiff performed labor and rendered services for the defendant from the second day of July, 1884, up to and including the twenty-ninth day of September, 1885, for which said services and labor the defendant agreed to pay the reasonable value; that said services were reasonably worth the sum of three dollars per day, or the aggregate sum of \$1,356; that although payment has been demanded, the plaintiff has not paid the same, or any part thereof, and the whole of said sum and legal interest thereon, from the twenty-ninth day of September, 1885, is and has been since said last-named day due and owing from the defendant to the plaintiff. Then follows prayer for judgment, etc.

The defendant's answer denied each allegation of the complaint, and then alleges in substance that G. C. Sears was formerly sheriff of Multnomah County, in whose hands a writ of attachment was placed for service, wherein I. R. Dawson was plaintiff, and William Druck et al. were defendants; that by virtue of said writ he attached a paper mill, with fixtures, machinery, and appurtenances, located near Bridal Veil Falls, in Multnomah County, Oregon; that on the eighth day of March said Sears duly appointed this plaintiff a special deputy or keeper of said property so attached, and employed plaintiff to take care of said property until the plaintiff's said authority to do so should be revoked; that plaintiff cared for said property till the second day of July, 1884. It is then alleged that this plaintiff sued Sears for such services at the rate of three dollars per day, and obtained a judgment against him for \$203, and \$34.57, costs and disbursements. It further alleged that the services sued for in this action were performed under the contract alleged to have been made with Sears, and were rendered, if rendered at all, as a continuation and a part of said contract with Sears.

The plaintiff denied by his reply that said services sued for

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were rendered under the Sears' contract, but after said Sears ceased to be sheriff, and that the same were not included in the action against Sears. The plaintiff had judgment, from which both parties have appealed. The defendant in his notice of appeal has assigned various errors. Those which were argued upon the appeal I will proceed to examine.

1. It is argued by the defendant's counsel that the court should have stricken out the testimony given by Powell, Withere'll, Jordan, Sears, and Hawley, because it was all clearly incompetent; it related to matters not at issue in the pleadings; all of this testimony related to services performed by Hawley as deputy sheriff and keeper, and could have no relation to matters in issue in this case. Several of these witnesses testify to the time and circumstances under which the plaintiff first took charge of the paper mill at Bridal Veil Falls, when it was attached at the suit of the present defendant, and his acts and words respecting the plaintiff's employment as keeper, as well as the acts and language of Mr. Smith, his attorney, the extent, nature, and value of the services rendered, etc. While some of the testimony given by each witness is not material, there is much of it that is, so that the court could not have allowed the defendant's application to strike out the evidence of either of these witnesses without striking something that was material and competent. This motion is in the nature of a demurrer to the evidence, and must be tested by the same rules. (*Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Heiderich v. Heiderich*, 18 Ill. App. 142.) In such a case the rule is that the demurrer admits all that the testimony objected to has proved, and all that it tends to prove, and hence if there is testimony tending to prove the issues in favor of the plaintiff, the judgment must be in his favor. (*Pennsylvania Co. v. Conlan*, *supra*; *Fent v. Toledo, Peoria & Warsaw R. R. Co.* 59 Ill. 349; 14 Am. Rep. 13; *Phillips v. Dickerson*, 85 Ill. 11; 28 Am. Rep. 607; *Morris v. Indianapolis & St. Louis R. R. Co.* 10 Ill. App. 389; *Atherton v. Sugar Creek & Philadelphia Turnpike Co.* 67 Ind. 334; *Heiderich v. Heiderich*, *supra*.) A motion to strike out the testimony of a witness cannot be sustained, if any part of it is

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admissible. (*State v. Hymer*, 15 Nev. 49; *Larkin v. Mitchell & Rowland Lumber Co.* 42 Mich. 296; *Chester v. Bower*, 55 Cal. 46.) Some portion of the testimony of each of these witnesses was both competent and relevant, and was clearly admissible. The court was therefore clearly not in error in overruling the defendant's motion to strike the testimony of these witnesses out of the case.

2. It is next objected that if Dawson made any promise to pay the plaintiff, it was void, for the reason it was not in writing. To make this objection available it ought to be presented by an exception to the ruling of the court below, either to the admission or exclusion of evidence, or to the giving or refusing instructions, or by demurrer in a proper case. So far as I am able to discover from the record this objection was not made in the court below in any form, and of course for that reason could not be presented here for the first time. But aside from this, the plaintiff does not declare upon a promise made to another, nor by the pleadings is the defendant called upon to answer for the debt, default, or miscarriage of another. The complaint is founded upon a contract alleged to have been made between the plaintiff and defendant, and there was some evidence tending to prove it. Of its weight or sufficiency the jury alone could decide.

3. The last objection is that the plaintiff's demand is against the sheriff of Multnomah County, and from the fact that he once sued the sheriff for a part of his demand, he cannot now maintain an action against Dawson. That the demand is entire and indivisible, and having recovered for a part of it, such recovery is a bar to the recovery of another part of the same demand. It is not necessary to consider or determine this question, for the reason that there is no such privity between Sears and Dawson as to make the judgment against Sears available in favor of Dawson as an estoppel. Estoppels only operate between parties and privies, and the fact that the plaintiff may have sued Sears, and recovered a judgment against him for a part of an entire demand, would not of itself defeat a recovery against the defendant of the residue of the same demand if he were other-

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wise legally liable for it. We have not considered and do not determine the legal relations between the sheriff and the keeper of attached property; but it may be proper to say that where a keeper is necessary his expense is in the nature of a disbursement, which the plaintiff might lawfully make and tax the same in the cause, should he prevail, in the same way any other necessary disbursement is taxed; but that the sheriff by employing a keeper does not make himself personally responsible to such keeper unless he shall do so by expressly agreeing to pay him. He might refuse to put a keeper in charge of such property, unless the plaintiff for whose benefit he acts would advance the necessary funds. In this case the defendant is charged with agreeing directly with the keeper to pay him, which we think he might do, and the jury having found in favor of the plaintiff we do not find any cause for disturbing their verdict. This disposes of the defendant's appeal, and the plaintiff's assignments of error in support of his appeal will now be considered.

4. The jury returned the following verdict:—

“H. H. Hawley v. I. R. Dawson.

“We, the jury in the above-entitled action, find for the plaintiff, and assess his damages \$1,356, with interest thereon from September 29, 1885, to date, at eight per cent per annum, amounting in the aggregate to \$1,613.64.

“H. S. CAMPBELL, Foreman.”

On this verdict the plaintiff moved for judgment for \$1,613.64, but the court refused to allow a judgment for that sum, but entered it for \$1,356, and this ruling of the court is now assigned as error by the plaintiff. It presents the question whether or not the jury might in estimating the plaintiff's damages include interest at eight per cent from the time the money ought to have been paid to the finding of the verdict. It is not claimed that the case falls within the statute regulating interest on money; but they claim that in an action for services where the sum is unliquidated, the jury may allow interest not exceeding the rate fixed by statute as a part of the plaintiff's damages for the unlawful withholding of that to which he was entitled.

Points decided.

A jury no doubt may properly allow interest as a part of the damages to which a party may be entitled in a number of cases, and numerous authorities lay down the rule broad enough to include this case. But when the amount of recovery is unliquidated, depending upon the market value of the commodity, or the reasonable value of services rendered, and there is no express agreement to pay interest, I am inclined to think the rule contended for by counsel ought not to be adopted. Under that rule interest is allowed by way of damages after default in making payment, but where the sum to be paid is in dispute and is unliquidated, it is difficult to say that the default in this sense happens till the amount which the party ought to pay is fixed and made certain. If it is desirable to have a more liberal rule as to interest, it is the province of the legislature to introduce it and not the court.

It follows from what has been said that upon each of these appeals the judgment appealed from must be affirmed.

[Filed June 7, 1888.]

PETER S. BRENNER, RESPONDENT, v. M. ALEXANDER,
APPELLANT.

EXECUTOR AND ADMINISTRATOR.—At common law, a general judgment against an executor who did not plead *plene administravit* or *propter*, is conclusive evidence of assets in a second action of debt suggesting a *devestavit*, the only qualification being that a matter arising subsequent to the former action, showing a destruction of the assets or removal of them from the hand of the executor without fault, may be set up.

EQUITABLE RELIEF.—A party can come into a court of equity for relief after a judgment at law only when he has been deprived of a legal right by fraud, accident, or mistake, unmixed with negligence or fault on his part. An executor or administrator in founding a right to such relief must exhibit a case free from negligence or misconduct.

EXECUTOR, JUDGMENT AGAINST.—Where an executor or administrator, believing that he has assets sufficient to pay all debts, suffers judgment against himself, he will be relieved in equity; if the assets become insufficient through an unexpected depreciation of their value, the reason is that the defense arises subsequently to the judgment, and without fault of the administrator. But if an executor or administrator confesses judgment against himself for a debt of his testator or intestate, upon a miscalculation of assets in his hands, and it appears afterwards that the assets are insufficient to satisfy it, he will not be relieved in equity against the judgment.

Opinion of the Court—Lord, C. J.

Hewitt & Bryant, and W. R. Bilyeu, for Respondent.

J. K. Weatherford, for Appellant.

LORD, C. J.—This is a suit in equity to enjoin the defendant from issuing an execution upon a judgment recovered by him against the plaintiff.

The facts are briefly these: The plaintiff was the administrator of the estate of Henry Isley, deceased, and while such, the defendant presented a claim against said estate for the sum of \$846.45, which was disallowed; that there came into his hands from all sources the sum of \$1,456.98, and the same was the total assets of said estate; that there was presented, and by him examined and allowed, claims against the said estate amounting in the aggregate to the sum of \$876.72, and that all of said claims have been paid in full of said assets; that the defendant brought an action against the plaintiff, as administrator aforesaid, to recover the amount of said claim disallowed, and in his complaint, among other things, alleged that the plaintiff had in his hands assets applicable to the payment of said claim, and sufficient to pay the same, but that he refused to apply the same thereon; that at the time the plaintiff filed his answer in said action, as such administrator, he had in his hands money over and above the payment of all claims against said estate, about the sum of \$166.26; that belonging to said estate was a note appraised at \$127.38, and real estate appraised at \$700, making a total according to appraised value of \$993.64, which the plaintiff then believed was reasonably worth that sum, and that he would realize that amount for it, and that the same would be sufficient to pay the defendant's claim in full; that at the time this plaintiff filed his answer to said complaint, his best knowledge and belief was that said allegation was true, and that he could not truthfully deny the same, and through mistake as to the true valuation of said property then in his hands, and relying upon the appraised valuation thereof, did not deny said allegation. That judgment was recovered against him on account of said claim against said estate for the sum of \$652.62 and costs, taxed at \$154.84, which said judgment was rendered against this

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plaintiff personally, and not as such administrator, and the same was docketed; that plaintiff has paid said costs and \$424 on the judgment, and that there now remains on such judgment the sum of \$280 unpaid; that by order of the County Court, this plaintiff had sold said real estate as by law required, to the highest bidder, for the sum of \$424, and that the same was approved and confirmed, and a deed executed therefor; that the necessary expenses of administration amounted to the sum of \$200, no part of which has been paid; that the defendant now threatens to cause a writ of execution to be issued on said judgment against the real and personal property of the plaintiff, and will, unless restrained, levy upon the same, etc.; wherefore, he asks a decree perpetually enjoining the defendant from enforcing the same, etc.

The defendant appeared and demurred to the complaint, on the grounds that the court was without jurisdiction, and that the complaint did not state facts sufficient to constitute a cause of suit. The court overruled the demurrer, and judgment was rendered for the plaintiff, from which this appeal is brought. Section 1135, Oregon Code, provides that the effect of a judgment or decree against an executor or administrator on account of a claim against the estate of his testator is only to establish the claim, as if it had been allowed by him, so as to require it to be satisfied in the course of administration, unless it appears that the complaint alleged assets in his hands applicable to the satisfaction of such claim, and that such allegation was admitted, or found to be true, in which case the judgment or decree may be enforced against such executor or administrator.

The contention of the plaintiff admits the regularity and validity of the judgment obtained against him, and that by his admission of assets as alleged, his personal liability thereon; but he seeks to avoid the effect of such judgment, and to restrain its enforcement, on the ground that he was mistaken, or miscalculated as to the value or sufficiency of such assets to liquidate such claim. Nor is it disputed, if the plaintiff had chosen to deny the allegations intended to fix his personal liability, in the event the claim was established against the estate, unless upon the proof

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submitted the jury found otherwise, but that he would have only been required by the judgment to satisfy it in the course of administration. Satisfied, however, in his own mind that he would realize a sufficient sum out of the assets in his hands to liquidate the claim, the facts indicate that he preferred to rely upon his own judgment, and incur the risk of individual miscalculation, than to put in issue such allegation, and thereby compel the proof of the same. His admission, therefore, obviated any evidence to that effect, and operated the same as if such allegation had been found to be true, thus authorizing the court to render the judgment fixing his personal liability thereunder. A like principle prevailed at common law. A general judgment against an executor who did not plead *plene administravit* or *propter* is conclusive evidence of assets in a second action of defendant suggesting a *devestavit*, the only qualification being that a matter arising subsequent to the former action, showing a destruction of the assets, or removal of them from the hands of the executors without his fault, may be set up. (*Tremmier v. Thompson*, 19 S. C. 252.) "This proceeds," said the court in that case, "on the ground that the action being against the executor for a debt of the testator, has embraced in it two distinct allegations, both of which are necessary to his recovery; *first*, that the testator owed the debt; and *second*, that the executor has assets to pay it, whether this latter is or is not expressly alleged in the complaint. The executor has the right to resist both allegations. He may plead *plene administravit*; indeed, he must do so, at the peril of having it concluded against him by default or confession that he has assets. This conclusion rests upon the doctrine of that kind of estoppel known as *res adjudicata*, that a party having the opportunity in an action to make a defense, and does not do so, is precluded from doing so afterwards." As the plaintiff in this suit was not precluded from making his defense in the action at law, but by his admission authorized the judgment rendered, he cannot now invoke the aid of equity to set it aside, unless he has been deprived of some legal right by fraud, accident, or mistake. "A party," said the chancellor, in *Glenn v. Maguire*, 3 Tenn. Ch. 696, "can come

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into this court for relief after a judgment at law only when he has been deprived of a legal right by fraud, accident, or mistake, unmixed with negligence or fault on his part." (*Kearney v. Smith*, 3 Yerg. 127; *Thurmond v. Durham*, 3 Yerg. 98.) This court has no power to supervise the proceedings of a court of law, nor to correct its irregularities. (*Thompson v. Meek*, 3 Sneed, 271; *Bissell v. Bozman*, 2 Dev. Eq. 160.) While, therefore, courts of equity to prevent injustice may interfere and afford relief, it is indispensable in founding a right to such relief that the executor or administrator exhibit a case free from negligence or misconduct on his part.

It sometimes happens that the assets in his hands are destroyed or depreciated by circumstances over which he has no control, or that a deficiency arises by the payment of claims in full, and subsequently other claims unknown at the time turn up and require to be paid, or there occurs some mistake of fact originating in ignorance or forgetfulness, or the belief in the existence of a thing which does not exist, material to the transaction, and in all such cases, if he has acted in entire good faith, and his conduct is free from negligence, equity will interpose and afford relief from the inequitable loss or injury which otherwise would befall him. (Story's Eq. Juris. §§ 90, 140; Freeman on Judgments, § 505; High on Injunctions, §§ 144, 165, 179, 191.) So that an administrator, believing that he has assets sufficient for the payment of all debts, suffers judgment to be entered against him, will be relieved in equity if the assets become insufficient through an unexpected depreciation of their value. The reason is, that the defense arises subsequently to the judgment, and without any fault of the administrator. So, too, if the act done or judgment suffered be made under a mistake or in ignorance of a material fact, and without fault on his part, it is relievable in equity. But if an executor confesses judgment against himself for a debt of his testator, upon a miscalculation of the amount of assets in his hands, and it appears afterwards that the assets are insufficient to satisfy it, he will not be relieved in equity against the judgment. (*Freelands v. Royall*, 2 Hen. & M. 575.) In that case, Roane, J., said: "Unless we say that it is

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not competent for an executor to admit assets and confess an unqualified judgment, we cannot interfere in the case." Fleming, J., said: "This appears to be a hard case, but it seems to have arisen from their own miscalculation as to the sufficiency of the assets in their hands to discharge the debt, and not from a misconception on the effect of their waiving their plea of fully administered, and confessing an unconditional judgment."

The case in hand is much stronger on its facts. The defendant had presented his claim to the plaintiff for allowance, and he had rejected it. There was no alternative left the defendant but to bring his action to establish the validity of his claim, and secure his right to its payment in the due course of administration, and in this connection the law gave him the right to allege and prove in that action, and the plaintiff to admit or deny, and compel proof that the plaintiff as such administrator had assets in his hands applicable to the payment of, and sufficient to satisfy such claim. Cognizant of the legal consequences of his act, he admitted the allegation and rendered proof of it unnecessary, and judgment was rendered against him for the amount of such claim as the statute directs.

There is no pretense that the property depreciated in value in consequence of some unexpected circumstance, or that the plaintiff was ignorant of any material fact in respect to such assets, only that he miscalculated or blundered in his judgment of their value, as measured by the sale subsequently made, and that he ought, therefore, to be relieved from the consequences of his own solemn admission made of record, and which deprived the defendant of the right to prove the truth of his allegation. There was no loss of property or depreciation from any cause of its value; it was the same at the time of the sale as it had been when the estimate of its value was gauged by the plaintiff and admitted to be sufficient to liquidate the defendant's claim. Nor was there any fact which exists now, but of which he was ignorant then, that influenced his calculation of value, and induced his default. He acted from the suggestions of his own mind, and took upon himself the choice of his own plea, and necessarily the legal consequence resulting therefrom. It may

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have been injudicious and ill-advised, but courts of equity cannot relieve parties from the consequences of such acts. It must be said, also, that other claims have been paid in full, and the defendant, relying upon the judgment obtained, has not looked to the estate for its payment, and now long after the rendition of such judgment the plaintiff says he miscalculated the assets, and acted injudiciously in making the admission of record, asks that he be relieved of its consequences.

We do not think we have the power in equity on the case made to do it.

The judgment must be reversed and the bill dismissed.

[Filed June 7, 1888.]

A. BUSH, APPELLANT, v. AUGUST GEISY, RESPONDENT.

JURY—WAIVER OF.—When the trial of a case, involving an issue of fact, is had without a jury, and the court directs a judgment, but fails to give a decision in writing stating the facts found and conclusions of law, as required by the Code, such judgment is irregular, and should be set aside upon the attention of the court being called to the fact. A judgment so entered is not void, but may be rendered so, either upon motion to the court in which it is entered, or upon appeal to a Superior Court.

MANDAMUS—WRIT OF—PEREMPTORY.—Where in proceedings of mandamus, to compel the defendant, who is county treasurer, to pay the plaintiff warrants held by him, duly drawn upon the defendant as such treasurer, it is ascertained in an issue made upon the return of an alternative writ that the defendant had funds sufficient to pay such warrants at the time they were presented to him, applicable to the payment thereof, and that the warrants presented were legal claims against the county; *held*, that the judgment should direct the issuance of a peremptory writ, commanding the defendant to pay the warrants forthwith. The right of a plaintiff in a mandamus proceeding to recover costs, under the Code of this State, does not depend upon his claiming or recovering damages therein. He is entitled to costs as a matter of course upon obtaining the relief sought.

APPEAL from Marion County.

George H. Burnett, for Appellant.

Tilmon Ford, for Respondent.

THAYER, J.—This case arises out of a proceeding of mandamus. The writ was issued out of said Circuit Court upon the

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petition of the appellant to compel the respondent, as treasurer of said county of Marion, to pay certain warrants drawn upon him by the county clerk of said county in favor of the appellant, and purporting to have been drawn by order of the County Court of said county. The respondent refused to pay the warrants on their being presented to him, upon the alleged grounds that they had been issued without authority. The case was tried before Hon. R. P. Boise, judge of said Circuit Court, without a jury, upon the petition, alternate writ, the return thereto, and proofs taken therein. It appears from the record that the trial was had on the thirteenth day of July, 1887, and that upon its submission the court, without finding the facts or conclusions of law, directed a judgment in favor of the appellant in accordance with the prayer of his petition, and that a judgment was so entered; that subsequently, and on the thirtieth day of August, 1887, during the term of court at which the said judgment was entered, the respondent filed a motion to set it aside, upon the grounds that such findings had not been made; and on the same day the appellant's counsel filed a motion, based upon an affidavit, to correct the omission by making and filing such findings *nunc pro tunc*; that after argument of the two motions, the court set aside said judgment, and proceeded to find the facts and conclusions of law, which were duly filed.

The following is the substance of the facts found: (1) That the respondent was the treasurer of said Marion County. (2) That on the sixth day of May, 1887, said County Court, sitting as a board of commissioners, duly authorized said county clerk to draw the warrants, by an order made for that purpose, which was entered of record. (3) That the said clerk duly executed such order. (4) That in the month of November, 1886, the said clerk filled out two warrants upon the treasurer, respectively, for ten thousand dollars and five thousand dollars, and delivered them to T. C. Shaw, who was county judge of said county, and he delivered them to appellant, and obtained from him the amount thereof in money, and used it for the benefit of said county. That the money received by the county judge was not paid into the treasury of the county; but was paid to the city of

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Salem to aid the city in building a bridge across the Willamette River to connect Marion County with the county of Polk.

(5) That said appellant was not advised for what purpose said money was to be used. (6) That prior to the time when said two warrants were executed, and the money advanced by appellant thereon, there was an understanding between him and the County Court, sitting to transact county business, that he would furnish money to the county at eight per cent on county warrants, to enable the county to meet current expenses, when it had no money in its treasury for that purpose, and be re-imbursed when the money came into the treasury from taxes; and that appellant furnished the money on the two warrants as a loan to the county in pursuance of that understanding. (7) That the warrants in question were issued in lieu of said two warrants, and the interest which had accrued thereon. (8) That the appellant presented the warrants in question (sixteen in number) to the respondent, as such treasurer, for payment or indorsement, and that respondent refused to pay or indorse them. (9) That at the time said warrants were so presented to respondent as aforesaid, he had in his possession as such treasurer sufficient funds belonging to said county to pay them, and which funds were applicable to their payment.

As conclusions of law the court found: (1) That the said sixteen warrants were valid and legal claims against said county. (2) That the appellant was the legal owner and holder of them. (3) That it was the duty of the respondent to pay or indorse the same when presented by the appellant. (4) That said warrants should draw interest at *eight per cent per annum* from the date of their presentment, the sixth day of May, 1887.

Upon these findings of facts and law, the appellant's counsel moved the said Circuit Court for a judgment, commanding the respondent to pay to the appellant the amount due upon the warrants, and for costs, which motion the court refused to grant, but directed a judgment in favor of the appellant and against the respondent, to the effect that the latter pay to the former the amount of said warrants and interest out of any money in his hands as such treasurer belonging to said county, applicable to

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the payment of current expenses, and that in case there were no funds in the said county treasury sufficient to pay all said warrants, then that he pay thereon what money there was in said treasury at the time of the service of said writ applicable thereto, as aforesaid, and that the remainder be paid out of the first money that should come into said treasury, which was applicable to the payment thereof. And the said court further directed and decided that neither party recover costs nor disbursements. The judgment entered in pursuance of said finding is the judgment appealed from herein.

The main grounds of error relied upon by appellant's counsel are, the setting aside of the judgment entered July 13, 1887, the refusal to allow the appellant's costs in the proceedings upon the writ of mandamus, and for not rendering a judgment directing a peremptory mandamus, commanding the respondent to immediately pay the amount due upon said warrants, with the accrued interest thereon, from the sixth day of May, 1887, at the rate of *eight per cent per annum*. The transcript contains no bill of exceptions, and we have no *data* by which to determine the questions involved in the case, except the findings of the court referred to. As to the right of the Circuit Court to set aside the judgment entered July 13, 1887, there can be no doubt. Courts have control of their own records, and are authorized to correct them so as to make them conform to the truth. Where a case involving a question of fact is tried by the court without a jury, its decisions should be given in writing, and conclusions of law separately, and which shall be entered in the journal, and judgment entered thereon accordingly. A judgment in such a case, without such decision having been made and entered, cannot be attacked collaterally; but it is so irregular that the court which directs it should, as a matter of duty, recall the judgment or set it aside whenever the fact is brought to its notice. Such a judgment may be avoided on appeal or by the court in which it is entered.

The question as to whether the appellant was entitled to recover costs depends upon the construction of the statute regulating mandamus proceedings, which provides: "That if judg-

ment be given for the plaintiff, he shall recover the damages which he shall have sustained by reason of the premises, to be ascertained in the same manner as in an action, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay." The respondent's counsel contends that it is only when damages are awarded to the plaintiff in the proceeding that he is entitled to recover costs, and that the appellant not having claimed damages was not, as a matter of right, entitled to costs. That the case under the circumstances came within the provision contained in section 568 of the Code, which is as follows: "In any action, suit, or proceeding, as to which the allowance and recovery of costs may not be provided for in this title, or elsewhere in this Code, costs may be allowed or not, according to the measure herein prescribed, and apportioned among the parties in the discretion of the court."

We would be inclined to adopt the counsel's theory, if we could do so consistently with the statute, not because of anything appearing particularly favorable to the exemption of the respondent from the payment of costs in this case, but cases have arisen, and are liable to arise frequently, in which an officer is greatly perplexed as to what his duty is in a certain matter. In such cases it would be a hardship to impose costs upon the officer for refusing to act when he did not know how to act. But is this one of the cases in which costs are not provided for as above mentioned? The answer to this question depends upon the construction to be given to the provision regulating mandamus proceedings before set out. Is this not a proceeding, "as to which the allowance and recovery of costs" is there provided for? If it had been intended that costs should be left in the discretion of the court in a mandamus proceeding, the Code, it seems to me, would have so provided in express terms; but instead of that it provides, as before shown, "that if judgment be given for the plaintiff, he shall recover the damages, to be ascertained, etc., together with the costs and disbursements."

It cannot seriously be claimed that this provision requires the recovery of damages as a condition to the recovery of costs and disbursements. The case belongs to a class in which the doing

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of the act sought to be enforced is the only relief which can be claimed or awarded. The law does not give damages for withholding the payment of money except by way of interest; that was claimed and allowed the appellant herein, which, I think, within the meaning of said provision, constituted a recovery of damages. But whether that is so or not is immaterial, as the legislature evidently only intended that damages should be allowed in cases where they could properly be claimed, and that the recovery of costs and disbursements in favor of the plaintiff depended upon his recovering judgment in the proceeding. In a great majority of the cases in which the writ of mandamus is issued the damages are merely nominal, and yet they involve important rights.

The refusal of a county clerk to record a deed to valuable real estate might occasion no damage in fact, yet it would be absurd to hold that the grantee would not be entitled to recover costs, as a matter of right, under the statute, where he had been put to the trouble and expense of enforcing the recording of it by means of such a proceeding.

I do not think that the view contended for by the respondent's counsel regarding the construction of the said provision of statute is maintainable. It appears to me that the appellant was entitled to recover his costs and disbursements in the proceeding as a matter of course. He is not, however, entitled to recover the costs and expenses of the entry of the judgment of July 13, 1887, which was set aside by the Circuit Court; nor of any costs or expenses created under the last-mentioned judgment, but should be required to pay the same, and the clerk's fees upon the motion to set it aside.

The judgment appealed from will be modified by directing the issuance of a peremptory mandamus to pay the amount of said warrants and interest forthwith, and in the other matters as herein indicated.

LORD, C. J. — As to the question of costs in proceedings of this kind, I understand the rule to be, that costs are not allowed unless expressly authorized by statute. At common law there

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was no costs, and this was true of civil as well as criminal cases. (Bacon's Abr. Costs.) And all the costs that are now allowed to either party, or any party, are given by statute, as well in England as in this country. But it was a rule in construing statutes of general application that unless the crown was named, it was not bound. (Bacon's Abr. Prerogative.) With us the State is sovereign and stands for the crown, and the same rule is applied in construing statutes, unless the State is named. Hence a statute giving costs to the prevailing party like our own does not include the State. To effect that result it requires some express provision. (*Collier v. Powell*, 23 Ala. 579; *State v. Harrington*, 2 Tayl. 44; *U. S. v. Barker*, 2 Wheat. 395.)

A like principle prevails in actions of a public nature, where officers are compelled to prosecute or defend in their official capacity, and such prosecution or defense is conducted in good faith and for the public benefit. In the *County of Clare v. Auditor-General*, 41 Mich. 183, Cooley, J., said: "That no costs are awarded where the case is of a public nature and has arisen from ambiguous legislation." So in *Houston v. Neuse River Nav. Co.* 8 Jones (N. C.) 476, which was an information in the nature of a writ of *quo warranto* against a corporation to have its privileges declared forfeited, etc., Battle, J., said: "The order dismissing the information is affirmed, but it is reversed as to costs. In a matter of a public nature, the officer who acts for the State does not pay costs for the other party." In *Hammond v. People*, 32 Ill. 446; 83 Am. Dec. 286, it was held that a prisoner released under a habeas corpus did not authorize costs to be taxed against the officer who arrested him under a valid process. Other cases might be referred to, but these are sufficient to illustrate the application of the principle. Now the case in hand is public in its nature, and is brought against the defendant, in his official capacity, to compel him to pay certain warrants drawn on him as such officer. He has defended the action, and as the court has not awarded costs against him, there is no error, unless there is some statute authority to tax him with the costs.

Our statute in relation to proceedings by mandamus provides:

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"That if judgment be given for the plaintiff, he shall recover the damages, etc., to be ascertained, together with the costs and disbursements." (Or. Code, § 601.) It was my impression that the statute intended to give costs and disbursements only in the event of a recovery of damages, which seemed to me could arise only in a case where the negligence or refusal of the officer to perform his duty had resulted in a loss or injury to the party, or the conduct of the officer was characterized by bad faith, or wilful misconduct of some kind, and that in such case, to lay the right to tax costs and disbursements, the facts constituting the grounds of damages must be alleged and proved before the court, under the provisions cited, would be authorized to award costs and disbursements against the officer as part of such judgment. Hence, I concluded that when no damage was asked or recovered, the party prevailing against the officer would not be entitled to costs and disbursements, or if entitled in any other case, it could only be by force of the provisions of section 568, which invested the court with the discretion of taxing costs or not as therein provided, although the absence of express mention of the State or its officers negatives this right, upon the reasoning of the authorities already referred to. Be that as it may, if such section is sufficiently pointed to include the case under consideration, the power to award and apportion such costs being a discretion vested in the court, we could not disturb his allowance in the matter, unless, at least, there was gross abuse of such discretion. And as the court has not awarded costs against the defendant officer, we would be justified in the assumption that his defense was conducted in good faith and for the public benefit. But as my brethren think that section 601 was intended to give costs and disbursements to whomsoever obtained judgment, irrespective of a recovery for damages, and as this view obviates the objection if such construction be correct, I therefore pass the point with this statement.

Points decided.

[Filed June 7, 1888.]

GEORGE AINSLIE & CO., APPELLANTS, v. BERTHA KOHN AND THOMPSON, DE HART & CO., RESPONDENTS.

MECHANICS' LIEN.—Where a statute which gave to mechanics and others a lien upon buildings and other structures for work done and material furnished in the construction thereof was repealed by another statute which also gave such lien, and provided that nothing contained therein should affect any lien theretofore acquired, but that the same should be enforced by the provisions of the repealing act; and parties had furnished such work and material during the existence of the repealed statute, and were engaged in furnishing such work and material at the time of the repeal, and continued thereafter so to do, and would have had such lien to the extent of the original contract price, or of any installment thereof, to become due thereon in accordance with the terms of the original contract, by giving written notices to the employer of the nature and extent of their claims against the original contractor; and the repeal of the former statute and adoption of the subsequent one took place before such an installment became due; *held*, that notwithstanding such written notice had not been given, the lien provided in the repealing act would, upon a compliance with its provisions, attach in favor of such parties to the extent of such installment. *Held, also*, that as the later statute had dispensed with the necessity of giving to the employer the written notice, the lien would attach without it. *Held*, that under section 5 of the act of the legislative assembly of the State, entitled "An act for securing liens for mechanics, laborers, material men, and others, and prescribing the manner of their enforcement," approved February 14, 1885, parties claiming the benefit of said act, on account of labor performed or material furnished in the construction of a building, except the original contractor, were only required to file their claims within thirty days after the completion of the building, when the labor was performed or material furnished for the purpose of completing it. *Held*, that requiring a claim to be filed containing a true statement of the demands as provided for in said section 5 is not to be construed as necessarily meaning an itemized statement; nor that the provision in said section 5, requiring to be filed a claim containing a true statement of the demand, "after deducting all just credits and offsets," is to be construed as meaning that the statement shall contain those veritable words; nor that the requirement in said section 5 that the claim shall be verified by oath of the claimant, or some other person having knowledge of the facts, is to be construed as meaning that such verification shall be signed by the claimant or such other person, and that if the statement of the demand was true as a matter of fact, and was shown to have been verified by the oath of the claimant or other person having knowledge of the facts before an officer authorized to administer an oath, it would be entirely sufficient.

APPEAL from Multnomah County.

H. B. Nicholas, for Appellants.

Emmons & Emmons, for Thompson, De Hart & Co.

16	363
24	140
19*	97
33*	1045
18	363
126	118
198	433
19*	97
37*	69
38*	438
16	363
28	307
29	120
16	363
30	293
16	363
132	404
16	363
36	492

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Dolph, Bellinger, Mallory & Simon, for Mrs. Kohn.

THAYER, J.—This appeal is from a decree of the Circuit Court for the county of Multnomah, rendered in a suit in which said George Ainslie & Co. were plaintiffs, and James Loynachan, Bertha Kohn, Thompson, De Hart & Co., J. C. Bayer, and John Turnbull were defendants. The suit was brought to foreclose a mechanic's lien which the plaintiffs claimed to have upon certain premises, situated in the city of Portland, owned by said Bertha Kohn.

They alleged in their complaint in the suit in substance that during the month of June, 1885, the defendant Loynachan was building and constructing a double-tenement house for said Bertha upon the premises referred to, and that during such times, including the time between the first and eighteenth days of said month, and while said house was in course of construction, they furnished, sold, and delivered to said Loynachan, upon a contract they made with him, doors, sash, and other material, and did certain glazing and mill work for the completion of the said house, amounting in value to the aggregate sum of \$683; that the said material was furnished and said work done, from time to time, as required in the construction of the house, up to and including the eighteenth day of June, 1885, at which time said Loynachan completed said building; that the said material so furnished and work done were used and entered into the construction of the said house, and became a part of it; that the plaintiffs, on the seventh day of July, 1885, and within thirty days after the completion of said building, and within thirty days after they had ceased to furnish said material and do said work therefor, duly filed with the clerk of Multnomah County a claim containing a true statement of their said demand, after deducting all just credits and offsets, and containing the other matters required by law to be stated, which claim was duly verified, and which the said clerk duly recorded in the proper book kept by him in his office for that purpose. They also alleged in the complaint that the defendants, Thompson, De Hart & Co., Bayer, and Turnbull, had, or claimed to have, some claim or lien upon said premises.

The latter defendants severally filed answers in said suit, setting forth the nature of the liens claimed by them respectively. Said Thompson, De Hart & Co. alleged in their answer in substance that on and between the sixteenth day of March and the seventeenth day of June, 1885, and while said defendant Loynachan was building and constructing the house mentioned and referred to in said complaint, they furnished, sold, and delivered to said Loynachan, to be used in the construction and creation of said building, certain material, of the reasonable and agreed value of \$263.53, which sum he promised and agreed to pay them upon the delivery thereof; that said material was furnished from time to time as required in the construction of the building, up to and including the seventeenth day of June, 1885, at which time it was completed; that the said material was used and entered into the construction of the building and became a part of it; that no part of said \$263.53 had been paid; that said defendants, on the twenty-fifth day of June, 1885, filed with the clerk of Multnomah County, in due form, a claim for said amount, with a statement containing a notice of intention to hold a lien upon said premises for its payment, and that said clerk duly recorded said claim in a book kept for that purpose in his office. The other defendants referred to claimed in their answers liens upon the said premises for work and material furnished by them respectively in the construction of said house; but as their claims are not in question on this appeal it is not necessary to mention the facts set out therein.

The defendant Bertha Kohn filed an answer to the complaint, in which she denied that said Loynachan was constructing the house for her in June, 1885, or that plaintiffs furnished any material or work for said house later than June 1st of that year; and she denied any knowledge or information sufficient to form a belief as to whether any statement or notice of claim against the premises was filed with the clerk of said county of Multnomah. She alleged in her answer that the said house was built under a contract entered into between her and said Loynachan March 2, 1885, and was completed prior to June 1st of that year, and that she never received any notice of plaintiffs' claim.

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The case was referred to a referee to find the facts and conclusions of law, and the referee appointed for that purpose found against said plaintiffs, and also against the said defendants, Thompson, De Hart & Co., and his report thereon having been confirmed by the said Circuit Court, the decree was entered in accordance therewith, from which the said appeal is taken. The proofs submitted to the referee showed that said Loynachan, on the second day of March, 1885, agreed in writing with Mrs. Kohn to furnish all the various kinds of materials and labor (except plumbing and gas fitting, staining, varnish, painting, graining, sewers, drains, lathing, and plastering) necessary to erect and completely finish the building referred to in the pleadings. The work was to be under the superintendence of architects, was to be pushed fast enough to insure its final completion by the 1st of June, 1885, and Loynachan was to pay five dollars for each day delayed beyond that time.

The contract price was \$3,695, to be paid in four installments as the work progressed; the last one, \$1,295, was to be made when the building was entirely finished and accepted by Mrs. Kohn, or the superintending architect for her. The architect had power to stop and report any work or materials not in accordance with the drawings and specifications. Loynachan commenced the work as agreed upon in the writing, and on the third day of March, 1885, entered into a contract with the plaintiffs that they should furnish the mill work, glass, and do the glazing on said house for \$1,268, \$600 to be paid after delivery of the cornice lumber, the brackets, window frames, and outside finish, the balance after the completion of the building. The plaintiffs furnished the said mill work, and did the glazing for the house under the said contract with Loynachan, between the 3d of March and the 1st of June, 1885, excepting that light was put in the transom, and the seat on the water-closet was changed by Loynachan at the direction of the architect, and finished by plaintiffs after June 1st of said year. Loynachan paid plaintiffs on account upon said contract on the fourth day of May, 1885, \$600. The plaintiffs furnished two openings of inside blinds, and changed the front doors to glass, in addition

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to the material furnished under the contract, which material went into said house, and was of the value of \$15.19, and which was done prior to June 1st, 1885. The plaintiffs filed with the county clerk of Multnomah County, Oregon, on July 7th, 1885, a statement of a claim for materials furnished in the construction of said house, for said \$668, balance, and for \$15.19, said extra material furnished, which was duly recorded as alleged in their complaint.

The defendants, Thompson, De Hart & Co., furnished said Loynachan hardware, between the sixteenth day of March and the seventeenth day of June, 1885, of the value of \$263.53, which the latter used in the construction of said house under his said contract with Mrs. Kohn, and on the twenty-fifth day of June, 1885, filed a statement of their claim against the said premises therefor, which was duly recorded as alleged in their answer in the suit. That the house was completed by Loynachan about the 10th of June, 1885, except some slight changes and alterations. That the architect accepted the house as finished by Loynachan on June 18, 1885, and Mrs. Kohn, on the twentieth day of June, 1885, paid to Loynachan the said last installment of \$1,295. She had, however, been in possession of the house from about the 5th of June, 1885, her son Marcus having slept there from that time, and she moved into it her entire furniture by about the fifteenth day of June, 1885.

Two objections were made to each of said claims. The one was, that they were defective in form and substance; and the other, that they were not filed for record within the time required by the statute. Upon one or both of these grounds, the learned referee held that neither claim constituted a lien upon the premises in question. It appears that while the work was in progress the Mechanics' Lien Act of 1874 was superseded by that of 1885. The latter act went into effect May 22, 1885; but it expressly provides that liens acquired under the Act of 1874 may be enforced under its provisions.

Counsel for the respondent suggest, however, whether as the alleged lien attached under said Act of 1874, it was not essential that the notice required by that act of the nature and extent of

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the claim against the original contractor should not have been given to the employer of such contractor (Mrs. Kohn). I have no doubt but that where the right to a lien in such cases has been lost by a failure to comply with the conditions of an existing statute, it will not be reviewed by a subsequent statute. Where, however, the time for the performance of the conditions has not expired when the statute imposing them is superseded, and the right is preserved by the subsequent act, it must be perfected, if at all, under the provisions of the latter.

The written notice required to be given was dispensed with, and the lien would therefore attach without it, unless the right to the lien had been lost when the latter act took effect. By not giving the notice while the Act of 1874 was in force, the payment made by Mrs. Kohn during that time of the installments due in accordance with the terms of her contract with Loynachan were relieved from all claim to such lien; but it continued to exist so as to bind to the extent at least of the deferred payments. The objection that the claims were not filed for record within the time required by the Act of 1885 is clearly untenable. The lien is expressly given by section 3669 of the Code, and the party claiming the benefit of it, save the original contractor, is only required to file the claim within thirty days after the completion of the structure, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor. (Code, § 3673.) Such is not the strict language of the latter section, but I think that it should be construed to mean that the claim may be properly filed within thirty days after the completion of the building, when it is for labor and material furnished for that purpose.

Section 3678 of the Code, which provides "that no payment by the owner of the building or structure, to any original or subcontractor, made before thirty days from the completion of the building, shall be valid for the purpose of defeating or discharging any lien created by this act, in favor of any workman, laborer, lumber merchant, or material man," etc., shows plainly that the construction of the preceding section indicated is correct. Whether then the claims were filed within thirty days after the

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work and material were furnished is unimportant, provided it was done within thirty days after the house was completed.

George Ainslie & Co.'s claim was filed for record July 7, 1885, and Thompson, De Hart & Co.'s claim was filed June 25, 1885. The referee found that the building was completed by Loynachan about the 10th of June, 1885, except some changes made subsequently; that the architect accepted it on June 18, 1885, and that Mrs. Kohn, on the 20th of June, 1885, paid to Loynachan the balance due him of \$1,295, and I think that the finding of the referee as to the time the building was completed is fully sustained by the testimony. Nor do I believe that the objection to the form and substance of the claims is well taken. The counsel for the respondent insists that the party claiming the benefit of the act in question must file with the county clerk an itemized statement of his account. The language of the act is that it shall be the duty of the claimant to file with the county clerk, etc., "a claim containing a true statement of his demands, after deducting all just credits and offsets, the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with said lien sufficient for identification, which claim shall be verified by the oath of himself or some other person having knowledge of the facts." (Code, § 3673.)

Section 3674 of the Code provides that "the county clerk shall record said claim in a book kept for that purpose, which records shall be indexed as deeds and other conveyances are required by law to be indexed, and for which he shall receive the same fees as are allowed by law for recording deeds and other instruments." The words "a claim containing a true statement of his demand" do not imply that the claim should contain an *itemized* statement. "Demand," as used in the act, evidently means the thing claimed as due, which in this class of cases is a sum of money, and a statement of the demand would be a recital of facts out of which it arises. Ainslie & Co. say that they furnished, sold, and delivered to Loynachan, for, etc., all the sash, etc., and did all the necessary glazing, and all the

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necessary mill work required for, etc., which was reasonably worth \$668, and that there was due and owing from Loynachan said sum on account of said work and material, and that they claim and intend to hold a lien upon certain premises to secure the payment of said sum. This certainly was "a claim containing a statement of their demand." So Thompson, De Hart & Co. said that by virtue of a contract made with Loynachan they furnished and supplied certain hardware and materials for, etc.; that the contract and reasonable price was \$263.53; that said sum was due, and it was their intention to hold a lien upon certain premises therefor. This, also, was "a claim containing a statement of their demand." The statute evidently did not intend to require more than a general statement of the matter to be recorded. To compel a party to have a record made of all the minutia of a claim, with the same particularity of that of a deed, would impose upon him an unnecessary burden, and would serve no useful purpose.

The reason advanced by the counsel for requiring an itemized statement of their account to be made is that subcontractors and material men are entitled to no more than the fair market value for their work and material furnished on the credit of the building, and hence the owner should be informed by the claim, so that he may make the necessary inquiries to satisfy himself of its justice as a lien on his property. This reason, viewed from a theoretical standpoint, appears specious; but practically it has no foundation whatever. The persons who supply labor and materials in such cases have ordinarily no opportunity to obtain an unjust lien upon the property.

The contractor is interested with bargaining with them upon the most advantageous terms to himself as to price. He knows what he receives, and unless he colludes with them to cheat the owner they are not able to obtain an unfair equivalent for what they furnish, and experience has shown that the collusion has more often existed between the owner and the contractor, to defraud laborers and material men, than between the latter and the contractor. The owner has it in his power to protect himself from being cheated; he can do as Mrs. Kohn did in this

case, exact from the contractor a bond of indemnity against loss. Mrs. Kohn could very easily have secured Ainslie & Co. and De Hart & Co. the payment of their claims.

If, before making to Loynachan the last payment, the \$1,295 paid on the twentieth day of June, 1885, she had instituted an inquiry as to whether or not the labor and material which had gone into her house had been paid for, she would readily have found out the true condition of affairs. Instead of doing that, and without waiting the thirty days after the completion of the building, as required by statute, she paid Loynachan off, and he decamped, leaving the claims unliquidated. That kind of course has been instrumental in producing difficulties and contentions in this class of cases. The owner has usually let the contract for the construction of his building to the lowest bidder, without regard to his standing or responsibility, and has taken no care or thought about the laborers and material men getting their pay. The contractor has often been an itinerant, and through persuasion and importunity, and sometimes by compromise with the owner, obtained his pay, and then "silently folded his tent" and departed. Such a course is well calculated to occasion, and has occasioned great injustice.

The legislative assembly of the State has realized the fact, and adopted one statute after another to correct the abuse; but in many instances, through the selfishness and cunning of the owners of the buildings constructed, the loose and careless mode pursued in securing rights under the statute, and the extreme technicality maintained by the courts in administering its provisions, the remedy devised has been ineffectual. It is high time such practices should be discountenanced, and persons who procure buildings to be constructed were made to understand that they owe some obligation at least to those who do the labor and furnish the material therefor. The latter class must, it is true, in order to preserve the lien provided by the statute, comply with its terms. But no such nice compliance as often insisted upon is absolutely essential to the preservation and enforcement of the lien. The statute is remedial in its nature, and should receive a reasonable construction. The respondent's counsel also

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objects to Ainslie & Co.'s claim, upon the grounds that the statement of their demands is untrue; that it states that they furnished the material between June 1st and June 18th, 1885. I do not think that is a correct version of the statement, although it is couched in such awkward language that such an inference might be drawn therefrom. By a close inspection of the instrument, however, it will be observed that the material was furnished during the construction of the building, and that Loynachan made the contract on the second day of March, 1885, and then proceeded to construct and finish it.

The language of the statement is: "That during the construction of said building the undersigned, etc., furnished, sold, and delivered to him, the said James Loynachan, for, etc., all the sash, etc., and did all the necessary glazing, etc., required for, etc., which was reasonably worth \$668." If the statement had stopped here, it would be implied therefrom, without doubt, that the work and material were furnished during the said time Loynachan was performing his said contract; but the draftsman of the statement added the following words thereto, "and was so furnished, done, and performed on during and between the first and the eighteenth days of June, 1885." It might be inferred from these words that the work and material were furnished at the particular time above specified. It is evident, however, that the draftsman did not intend to convey that meaning, but meant in fact that the sale and delivery of the articles and doing the work were completed at that time. The language employed in a subsequent part of the statement serves to confirm this view. He there says, in an independent paragraph, "that all of the material and work hereinbefore mentioned were furnished from time to time as required, and up to and including the eighteenth day of June, 1885, when the said building was completed, and the said George Ainslie & Co. ceased to furnish material thereon or therefor."

The counsel for the respondent objects to Thompson, De Hart & Co.'s claim, upon the grounds that the statement of the demand does not show it to be a true statement of it after deducting all just credits and offsets, and that the verification

thereof is not signed by the party making it. The proofs in the suit show that, as a matter of fact, the claim contained a true statement of the demand, and it purports on its face to be a true statement of the demand, and it is verified to that effect; that it is just and true, after deducting all proper credits and offsets. That seems to me to be sufficient. The verification does not appear to have been signed by the party making it; but I do not think that is sufficient ground of objection to the claim.

The statute does not require any particular form of verification; it merely requires that the claim shall be verified by the oath of the claimant, or of some other person having a knowledge of the facts; and the certificate of Mr. Emmons, notary public for Oregon, attested by his signature and notarial seal, shows that Mr. E. J. De Hart, one of the claimants, did verify the claim in question. I am unable to discover any valid objections to the two claims considered. They are for work and material used in the construction of the respondent's building, which she is enjoying the benefit of, and her plea that she has paid Loynachan for it is unavailing; the payment to him did not relieve her property. She had no right, although a woman, to be persuaded by a knave to pay him money which belonged to others.

The decree appealed from must be modified so as to allow said George Ainslie & Co. and Thompson, De Hart & Co. each a decree for the amount of their respective claims; but in view of all the facts of the case they should not be allowed to recover costs. Each of the parties, appellant and respondent, must pay their own costs and disbursements in both courts.

On petition for rehearing.

THAYER, C. J.—The counsel for the respondent, Bertha Kohn, ask for a rehearing in this case upon the grounds: (1) That no judgment has ever been recovered against the original contractor, James Loynachan; (2) that the contract for the building, entered into between Bertha Kohn and Loynachan, was executed prior to the time the Act of 1885 went into effect, and by the terms of the contract of building Mrs. Kohn was

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absolutely bound to pay Loynachan the amount therein provided at a certain time, and that there was no way in which she could retain any part of the contract price for the benefit of the appellants; (3) that the statement of Ainslie & Co. was untrue, in that they state that they furnished material of the value of \$668, and that nothing was paid, while the evidence tended to establish that the material they furnished was of the value of \$1,268, and that \$600 was paid to Loynachan; and (4) that the evidence establishes the fact that the building was completed in June, 1885, and that Ainslie & Co were too late in filing their notice. I have carefully considered these various points and am of the opinion that they are not tenable. The act does not require that a judgment shall be recovered against the original contractor; it provides "that all persons personally liable, and all lien-holders whose claims have been filed for record, etc., and all other persons interested in the matter in controversy, or in the property sought to be charged with the lien, may be made parties; but such as are not made parties shall not be bound by such proceedings." If the act had required the recovery of such judgment, its efficacy as a remedy could always be defeated by the act of the original contractor. He would only have to go out of the State and remain in order to prevent the enforcement of the lien, as the service of summons could not be made upon him in such a case by its publication. The legislature could not have intended that the enforcement of the lien must depend upon any such condition; if it had, it certainly would have provided for the recovery of the judgment in some manner, where personal service of summons could not be had. The contract for the building having been executed prior to the time the Act of 1885 went into effect, and the terms of payment of contract price upon the part of Mrs. Kohn being absolute, did not relieve her from the obligation she was under to the appellants.

The act to provide for liens of mechanics, etc., and prescribing the manner of their enforcement, approved October 28, 1874, was in force at that time, which entitled the appellants to a lien to the extent of the contract price, and the terms of the

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payment were subordinate to the provisions of that act. The Act of 1885 continued such lien, and provided for its enforcement. Mrs. Kohn, when she made the deferred payment mentioned in the opinion herein, heretofore delivered, had a good defense against such payment. Her agreement to pay the contract price, although absolute in terms, was upon condition that Loynachan should pay the appellants, and thereby relieve her property from the lien in their favor, given by the statute. Parties contract with reference to existing provisions of law, which enter into and become a part of the terms of the contract. The statement of Ainslie & Co. was technically untrue. To have been precise, they should have set out the original amount of their claims, given the credit thereon, and have claimed the balance, but the result would have been the same. The discrepancy was so slight that it could not have misled Mrs. Kohn, and cannot, in my view, be deemed material. The other points made by respondent's counsel in his petition for a rehearing was fully considered in the former opinion of the court, and I see no reason for changing the view there expressed regarding the matter to which it relates.

The petition must therefore be denied.

[Filed June 7, 1888.]

J. W. COFFIN, RESPONDENT, v. O. D. TAYLOR,
APPELLANT.

16	375
18	114
18*	638
22*	647

16	375
48	571
48	618

INSTRUCTIONS—BILL OF EXCEPTIONS—ASSIGNMENTS OF ERROR.—No assignment of error can be made or will be considered, unless the error appear from the bill of exceptions, or some other part of the judgment roll.

CHATTEL MORTGAGE—FUTURE ADVANCES.—A chattel mortgage may be made to secure future advances, but if no advances be made under such mortgage, it cannot be enforced by the mortgagee.

SAME.—As between the parties to such mortgage, if no advances be made, it never becomes a lien on the property described therein for any sum because there was nothing due, and an attempted sale of the property by the mortgagee, and purchase thereof by him, does not divert the title of the mortgagor.

REPLEVIN—DAMAGES.—In an action of replevin, if the plaintiff prevails, he is entitled to recover damages for the wrongful taking and detention of the property from the time when taken to the rendition of the judgment.

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REPLEVIN—MEASURE OF DAMAGES.—The jury may consider the nature and character of the property in controversy, and if the plaintiff prevails in the action, award him such damages as the use of the property was worth during the time of the detention.

INSTRUCTIONS—PRESUMPTION.—When the record is silent as to what instructions the court gave the jury, the legal intendment is that they were properly instructed. He who alleges error must make it affirmatively appear from the record.

APPEAL from Wasco County.

Gates & Bradshaw, and *George Watkins*, for Respondent.

W. L. Hill, and *E. B. Dufur*, for Appellant.

STRAHAN, J.—This is an action of replevin to recover the possession of a span of horses and a set of double harness of the alleged value of two hundred and seventy dollars, and two hundred and fifty dollars for the wrongful taking and detention thereof. The answer denies the material allegations of the complaint, and then alleges, in substance, by way of further and separate defense, that on April 9, 1885, the plaintiff gave the defendant a chattel mortgage on the property in controversy to secure the payment of two hundred dollars four months thereafter, and that said plaintiff neglected to pay the same; that after such default the defendant caused said mortgage to be foreclosed in Washington Territory, where said property was, and where said chattel mortgage was filed, and that upon such foreclosure and sale the defendant purchased the same for one hundred and fifty dollars. The defendant Dufur only acted as attorney for Taylor in conducting said sale, and it is not now claimed that he is in any manner liable therefor.

The reply, after denying the new matter in the answer, alleges in effect that the defendant promised to advance for the plaintiff the sum of two hundred dollars to one L. Newman, and that the note and mortgage mentioned in the answer were executed solely to secure the defendant said sum of two hundred dollars so agreed to be advanced on account of the plaintiff, and that the defendant failed to make said advance for the plaintiff, and that said mortgage and the note described therein were without

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consideration. Upon the trial the jury returned a special verdict as follows:—

“We, the jury in the above-entitled action, find specially as follows: *First*, that the note which the chattel mortgage was given to secure was given to the defendant, O. D. Taylor, in consideration that said O. D. Taylor would pay to L. Newman the sum of two hundred dollars on account of Coffin at Newman's; *second*, that the notice of foreclosure proceedings was served on the plaintiff on or prior to the sixteenth day of August, 1886, at Skamania County, Washington Territory; *third*, that the black horse is of the value of ninety-five dollars; *fourth*, that the bay horse is of the value of eighty-five dollars; *fifth*, that the set of harness is of the value of twenty dollars; *sixth*, that the value of the use of the property involved in this case has been two hundred dollars since the same was taken from the possession of the plaintiff.

“A. B. WOOLEY, Foreman.”

The jury also returned a general verdict in favor of the plaintiff as follows:—

“We, the jury in the above-entitled action, find for the plaintiff and against the defendant, O. D. Taylor, and assess the damages at two hundred dollars. We further find that the plaintiff is the owner and entitled to the possession of all the property mentioned in the complaint; that the black horse is of the value of ninety-five dollars; that the bay horse is of the value of eighty-five dollars; and that the set of harness is of the value of twenty dollars.

“A. B. WOOLEY, Foreman.”

The defendant moved for judgment in his favor on the facts found by the special verdict, and notwithstanding the general verdict, which motion was overruled by the court, and judgment rendered for the plaintiff for the recovery of the property in controversy, or two hundred dollars, the value thereof, in case delivery could not be had, and for two hundred dollars damages for the unlawful taking and detention thereof, from which judgment this appeal is taken.

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1. Neither the instructions given or refused by the court upon the trial appear in the bill of exceptions. The assignments of error in the notice of appeal, so far as they relate to such instructions, must therefore be disregarded. Nor is it necessary to specially consider the rulings of the court in the admission of evidence, for the reason that the evidence offered by the plaintiff and objected to by the defendant related entirely to the new matter pleaded in the reply, in avoidance of the new matter contained in the answer. This evidence related to an issue in the case made by the pleadings, and if the issue was material, the evidence was so. The real point in this controversy is therefore presented by the pleadings, verdict, and judgment, and that is, whether or not it is competent for the plaintiff to allege and prove upon this trial, that the mortgage under which the defendant claims the property in controversy never became effectual or operated as between the parties to it by reason of the defendant's failure to make the advance, which it is alleged in the answer he agreed to make as the consideration for said mortgage.

The plaintiff maintains that as between himself and the defendant, the writing under and through which the defendant claims to have acquired the property in controversy was without vitality, and conferred no rights whatever upon the defendant until he had performed the essential act on his part, which was the making of the advance to Newman for the plaintiff. A reference to the authorities is necessary to determine whether or not this position be correct. Jones on Chattel Mortgages, section 96, says that such a mortgage may be in the form of a security for the payment of a sum certain, leaving the true nature of the transaction to be shown by parol proof. The extent of the security is thus limited to the amount specified in the condition and of which the registry gives notice. But if no advances be made under such a mortgage, it cannot of course be enforced by the mortgagee; nor can it be enforced by his assignee, unless it was given to secure negotiable paper, and was assigned before maturity, without knowledge on the part of the assignee of pre-existing equities. Then to be secured by a mortgage is the principal thing; the mortgage is a mere incident.

Without the debt the mortgage cannot exist as between the parties to the transaction. If the debt be paid the mortgage would be extinguished, or if the facts do not exist to give the debt validity, or if enough were not done by the parties to create it, or if it were conditional and the condition had not been performed, then in either event, there being no debt, there could be no mortgage. These principles are fully illustrated and supported by *Ladue v. Detroit & Milwaukee R. R. Co.* 13 Mich. 380. In that case the court said: "The instrument can only take effect as a mortgage or encumbrance from the time when some debt or liability shall be created, or some binding contract is made, which is to be secured by it. Until this takes place, neither the land nor the parties, nor third parties, are bound by it. It constitutes of itself no binding contract. Either party may disregard or repudiate it at his pleasure. It is a part of an arrangement never contemplated as probable, and which can only be rendered effectual by the future consent and further acts of the parties." So it was held in *Ter. Hoven v. Kerns*, 2 Pa. St. 96, that a judgment or mortgage made to secure future advances will be good against a subsequent encumbrancer, only for such advances as are actually made before notice of the subsequent encumbrance; that as to all advances made after notices of such subsequent encumbrance, such mortgage or judgment will have no priority; but they are made subject to the junior lien. And the same principle was applied in the *Bank of Montgomery County's Appeal*, 36 Pa. St. 170; *Parmentier v. Gillespie*, 9 Pa. St. 86; *Robinson v. Williams*, 22 N. Y. 380; *Bissell v. Kellogg*, 60 Barb. 617; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; 49 Am. Dec. 175. The general verdict for the plaintiff covers the issue made in the pleadings as to the advance to be made to Newman, which was the consideration for the mortgage, and conclusively settles it against the defendant. It thus appears from the record that the mortgage under which the defendant claimed the property in controversy never became a lien on such property for any sum, because there was no sum due, and that the attempted sale of the property by virtue of such mortgage did not transfer or divest the plaintiff's title.

2. Upon the argument here the defendant's counsel insisted that in this action no damages were recoverable for the wrongful taking and detention of the property, except such as had accrued up to the commencement of the action. No authority was cited sustaining this proposition, and it is not the law. It is true the case is tried and determined upon the rights of the parties as they existed when the suit was begun, but damages may be and usually are assessed up to the time of the rendition of the judgment. (Wells on Replevin, § 525.)

3. The bill of exceptions recites that the plaintiff introduced evidence tending to show that the value of the use of said property, at the time of the alleged taking thereof by the defendant, and thereafter, was from one dollar and fifty cents to two dollars and fifty cents per day.

This evidence was introduced without objection. No exceptions appear to have been taken to the admission of evidence or to instructions given by the court as to the measure of damages. The only way possible, then, for the question to come before us is on the special verdict. By that finding, and the motion made thereon, the question is not presented in a very satisfactory form for review, but there is probably enough to enable us to indicate our view of the law on that subject. And the general rule seems to be, in this class of actions, that the plaintiff may recover such damages for the detention of the property as the jury from all the evidence may be satisfied that the use of the property, considering its nature and character, was worth during the time of the detention. (3 Sutherland on Damages, 539; *Odell v. Hole*, 25 Ill. 204; *Morgan v. Reynolds*, 1 Mont. 163; *Allen v. Fox*, 51 N. Y. 562; 10 Am. Rep. 641; *Scott v. Elliott*, 63 N. C. 215; *Clapp v. Walters*, 2 Tex. 130; *Butler v. Merhling*, 15 Ill. 488; *Zitske v. Goldberg*, 38 Wis. 216.) Other authorities might be cited, but it is unnecessary. These fully sustain the proposition that the value of the use of the property wrongfully taken and withheld is recoverable as damages in an action of replevin, and that such damages may be estimated down to the day of trial. Counsel for appellant have cited *Twinam v. Swart*, 4 Lans. 263, in opposition to the views here expressed; but much of what is

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there said was *dicta*. But this case was disapproved on principle in *Allen v. Fox, supra*, and cannot be regarded as an authority to sustain the doctrine contended for. Within admitted principles of law the jury had the right to find the amount of damages specified in their verdict. It was a question of fact for their determination under proper instructions from the court. It does not appear from the records what instructions the court gave the jury. In such case it cannot be assumed that the court instructed erroneously. On the contrary, the legal intendment is that proper instructions were given. To hold otherwise would be to presume error, which is never done. He who alleges error must make it appear affirmatively from the record.

It follows from the views expressed that the judgment appealed from must be affirmed.

[Filed June 7, 1888.]

J. I. CASE THRESHING MACHINE CO., PLAINTIFF,
v. W. H. SMITH, DEFENDANT.

AGREEMENT—WHEN OBLIGATORY.—Where an order sets forth the terms of a complete agreement, and it is signed by the party to be charged, it is not essential that the writing should bear the signature of the other party; but to make it obligatory, it is necessary that the other shall have accepted or assented to the terms of the agreement it contains.

EXECUTORY CONTRACT.—An executory contract, in which the plaintiff has obtained the note or memorandum essential to charge the defendant, but has not given a corresponding one itself, may enforce it, although the defendant cannot, and the former having secured, while the other has not, the evidence, which the statute has made indispensable to its enforcement.

SAME.—In such case the order or contract is a necessary part of the plaintiff's case to show its acceptance of the order and compliance with the terms, but the defendant could not set it up as new matter, for he lacked the evidence which the statute has made indispensable to charge the plaintiff and prove his allegations.

REPLEVIN.—When in an action of replevin the plaintiff had simply proved orally that his agent had sold a machine and taken an old one in part payment, and was content thus to establish his title to it, the defendant had the right to meet and rebut this, by showing upon the case made that there was an implied obligation which the law imposed to furnish a machine reasonably fit to serve the purposes to which it was to be applied, and that the plaintiff had not performed such obligation when he had delivered a machine that would not do ordinary good work.

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SAME.—Where to obviate this the plaintiff procured such order or contract to be admitted as part of the evidence of the defendant and against his objection, in order to avail itself of the benefit of its provisions and to deny the debt, the provisions in his favor on account of his failure to settle on delivery did not relieve the plaintiff of proving that he furnished the machine ordered, and which was reasonably fit for the purpose intended, or the defendant of showing his non-compliance therewith, because such undertaking was a part of the contract precedent, to be performed by the plaintiff before any obligation devolved upon the defendant under such contract.

CONDITION PRECEDENT.—The reason is that such facts constitute a part of the contract of sale itself, and operate as a condition precedent and not as a warranty or agreement collateral to the sale.

R. Williams, and Cox, Smith & Teal, for Appellant.

Ford & Kaiser, for Respondent.

LORD, C. J.—The action is in replevin. The complaint is in the usual form, and all the facts alleged in it are specifically denied by the answer. Upon the trial, verdict and judgment went for the defendant, and the plaintiff appeals therefrom to this court. The objections urged in reversal of the judgment are directed to two points, and relate to the admissibility of certain evidence excepted to, on the grounds that it was not supported by any allegations contained in the answer, and that the defendant under the terms of his order had waived its conditions, and was not, therefore, entitled to offer any evidence in respect thereto.

These questions arise in this wise: The defendant and an agent of the plaintiff conducted oral negotiations for the purchase of a threshing machine, which resulted in the execution by the defendant of an order addressed to the plaintiff, in substance, that the plaintiff should ship, on or before a certain time therein specified, a threshing machine to the undersigned defendant of the description named, which was warranted to be made of good material and durable, and with good care to do as good work as any machine in the United States; that if after a trial of ten days the machine would not bear the above warranty, written notice was to be given by the defendant to the plaintiff, stating wherein it failed to satisfy such warranty, and reasonable time was to be given to the plaintiff to remedy the difficulty, and to replace any defective part of such machinery; and if then the

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machine could not be made to fill such warranty, it was to be returned to the purchaser free of charge to the place where received, and another substituted therefor, which should fill the warranty, etc.; and further providing that all warranties are to be invalid in case the machine is not settled for when delivered, etc., and in consideration thereof the defendant agrees to receive the same on arrival, and on delivery to pay to the agent of the plaintiff cash or notes with approved security, etc. On the margin of this order is written: "Mr. Smith agrees also to deliver one thirty-inch Westing horse separator and ten-inch H. power to Turner's Station, free of charge, and complete, ready, and in good working order, together with all tools to make complete." This is known on this record as the old machine.

At the trial the agent of the plaintiff testified that the agreed price for the new machine which had been ordered by the defendant was two thousand dollars, made up of seventeen hundred dollars in notes and an old machine, which was to be taken at a valuation of three hundred dollars; and this is the machine to recover which the present action was brought. After the plaintiff had rested, the defendant offered evidence tending to prove that the machine did not do ordinarily good work; that notice of the defects was given, and that after repeated efforts by the agents of the plaintiff to remedy it, it still failed to do ordinarily good work, and was of "no account"; that before the expiration of ten days the defendant returned the machine to the station whence it was received, for the reason that it would not do ordinarily good work at threshing grain, and was not reasonably fit to serve the purposes for which it was ordered, and to which it was to be applied, to all of which evidence the plaintiff, by his attorneys, excepted. The defendant himself testified that the purchase price of the new machine was seventeen hundred dollars and not two thousand dollars, and the understanding was that if he accepted the new machine he was to have the option of turning in the old machine upon the purchase price at two hundred dollars. It also appears that the defendant had not settled for the machine, nor after its return to the station had the agent of the plaintiff offered to substitute another for it,

although present during much of the time from its receipt until its return. There were certain instructions also asked which were refused; but as they were designed to raise the same objection suggested as to the admissibility of the evidence, they may be dismissed without further notice.

The argument for the exclusion of the evidence excepted to proceeds upon the theory that when the defendant signed and sent his order, and in pursuance thereof the machine was sent to the defendant, there was a completed sale or executed contract, and as the old machine constituted a part of the consideration for such contract, it was included in such sale, and became the property of the plaintiff; and that by the defendant's neglect or failure to give the notes required by the terms of his order, the warranties therein failed, and consequently no evidence in respect to them was admissible. The contention, therefore, is (1) that before the defendant could offer any evidence of the failure of the machine to comply with the warranty as to its working capacities, the facts thereof must have been set up as new matter; and (2) that if set up in this action the defense would be unavailing, for the reason that the failure to give the notes, or settle as provided in the order, worked a waiver of the conditions therein expressed.

In making out its case at the trial, the record discloses that the plaintiff ignored the order; it did not offer it in evidence to show compliance with its conditions and to establish its title to the old machine, but during the cross-examination of the defendant procured its introduction against the objection of his counsel as part of his testimony. It is to be noted that this order is not signed by the plaintiff, nor any one on its behalf, but it is signed by the defendant, the party to be charged thereby. Nor is it essential that the writing should have the signature of the plaintiff. To make it obligatory upon the defendant it is only necessary that the plaintiff should have accepted or assented to the terms of the agreement it contains. (*Justice v. Lang*, 42 N. Y. 403; *Dressel v. Jordan*, 104 Mass. 412.) Now this order referred to is simply a proposal on the part of the defendant as to the terms on which he offered to purchase a threshing machine.

It was an order asking the defendant to send him a machine on certain express conditions therein named, which the plaintiff undertook to fill, and must, therefore, have accepted or assented to. It provided in substance, as a condition precedent to its acceptance, that it must do as good work as any machine in the United States by using it with proper care, and for the purpose of ascertaining whether it would comply with such conditions, the defendant was given the right to test it by ten days' trial. By its terms, therefore, the machine is delivered to the defendant to fix his acceptance or rejection of it. The law is plain that there can be no absolute sale by which the ownership of a chattel is transferred until there has been an acceptance with an intent to receive it as owner. But whether the defendant would accept the machine and thereby become the owner of it, depended on the fact to be demonstrated whether it fulfilled the conditions named, and would "do as good work as any other machine in the United States." Necessarily while such right remained, the contract could not be executed, and no title to either the new or old machine passed.

We have, then, an executory contract, in which the plaintiff has obtained the note or memorandum essential to charge the defendant, but has not given a corresponding one itself; "and in such case," said Virgen, J., "the plaintiff may enforce it, although the defendant cannot, the former having secured, while the other has not, the evidence which the statute has made indispensable to its enforcement." (*Williams v. Robinson*, 73 Me. 194.) The contract, therefore, was a necessary part of the plaintiff's case, to show its acceptance of the order and compliance with its terms, but the defendant could not set it up as new matter, for he lacked the evidence which the statute has made indispensable to charge the plaintiff and prove his allegations. Besides, as the case stood, the plaintiff had simply proved orally that his agent had sold the new machine to the defendant, and taken the old one in part payment. By this evidence he was content to establish his title to the old machine, and as a consequence that the contract was fully executed on his part.

The defendant had the right to meet and rebut this, and he

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sought to do it, not by showing that any conditions of the order had not been kept by the plaintiff, or to enforce any of the conditions of such order or other writing, but by showing, upon the case made by the plaintiff, that there was an implied obligation which the law imposed to furnish a machine reasonably fit to serve the purposes to which it was to be applied or used, and that the plaintiff had not performed such obligation when he had delivered a machine which would not do ordinarily good work, and was of "no account." In such case the evidence was clearly admissible. But to obviate and exclude this evidence the plaintiff procured the order to be admitted in the manner already stated, and now seeks to avail itself of the terms of the order beneficial to it, and to deprive the defendant of the benefit of the conditions essential to his protection, and required to be performed by the plaintiff as a part of such sale, because it is argued that the failure of the defendant to settle when the machine was delivered operated as a waiver of the conditions as to the fitness of the machine, and its capacity to do as good work as any other machine in the country.

This argument assumes that it makes no difference what kind of machine the plaintiff may have delivered to the defendant, or how unfit it may have been to serve any purpose to which it was to be applied. He has precluded himself, by his conduct in not settling for the machine when delivered, from raising any objections to it, or offering any evidence in respect to the conditions contained in the order, or otherwise; but this does not relieve the plaintiff in the form in which this action is brought of the necessity of showing title in itself, and which, it must be admitted, can only be done by showing a contract executed on its part. To do this it was incumbent on the plaintiff to prove a compliance with those conditions necessary to be performed by it to constitute a sale. It was required to prove that it furnished a machine of the working quality ordered, and fit for the purpose intended, because such undertaking was a part of the contract of sale itself, and operated as a condition precedent, to be performed by the plaintiff before any obligation devolved upon the defendant under the contract. Its evidence in establishing

such facts to make out its right and title to the old machine, the defendant could rebut by showing the facts to be otherwise.

This would admit the evidence excepted to, and which the court admitted, because such evidence tends to controvert the facts which the plaintiff must establish, that the machine delivered was such as the defendant agreed to purchase, and to show its non-compliance with its engagement. The reason is that such facts constitute a part of the contract of sale itself, and operate as a condition precedent, and not as a warranty or agreement collateral to the sale. To say that the conduct of the defendant nullified this obligation is to destroy the contract itself, and consequently, until the plaintiff performed, or showed a performance of such conditions precedent, there was nothing to fix an acceptance on the part of the defendant, or to show a complete sale on its part. Again, if it be said that the plaintiff was not bound by the order, or that such conditions of the order were not enforceable against it by the defendant for the want of its signature, and the case stood as to the plaintiff without such order, or unilateral, yet there would exist the implied obligation which the law enforces, that the plaintiff should furnish a machine fit for the purpose of doing ordinary work at threshing grain, and the right of the defendant on receipt of the same to a reasonable time in which to examine and test it, for the purpose of ascertaining whether it corresponded with the implied condition as to fitness or its working qualities.

While this right remained there could be no executed sale—no acceptance with the intent to become owner—and without this no title passed to the old machine, conceding it was to be a part of the consideration, although the evidence is conflicting in respect to it. So that in any view, as this record stands, we think the judgment must be affirmed.

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[Filed June 7, 1883.]

HIRAM BROWN ET AL., APPELLANTS, v. E. O. CORSON ET AL., RESPONDENTS.

CONGRESSIONAL GRANT TO AID IN THE CONSTRUCTION OF O. & C. R. R. LAND "PRE-EMPTED."—By the terms of the Act of Congress of July 25, 1886, granting lands to aid in the construction of the O. & C. Railroad, lands on odd sections within the twenty-mile limit which had been *pre-empted*, did not pass to the company by the terms of the grant, but were excepted out of such grant.

EVIDENCE—PRE-EMPTION.—A paper certified by the register of the land office to be a correct copy of the form of pages 160 and 161 of the register of declaratory statements on file in said office, and which is headed, "Register of declaratory statements under Act of Congress of September 4, 1841, and amendments thereto," and which contains a description of the land in question, etc., is not sufficient proof that the land described therein had been *pre-empted* at the time the railroad grant attached.

PRE-EMPTION—HOW ACQUIRED.—A pre-emption is a right derived wholly from statute, and a substantial compliance with the statute is necessary to its acquisition, which compliance must be shown by competent evidence.

SAME—WHAT EVIDENCE NECESSARY TO PROVE.—The evidence offered must show that the conditions existed which would enable the pre-emption, or to acquire the land under the law, and that he had performed at least enough to give him some inchoate right to the land.

COVENANT OF WARRANTY—BREACH—EVIDENCE.—In an action founded on a covenant of warranty in a deed where the grantee surrenders to another title without judicial process, he must prove the existence of such paramount outstanding hostile title, and that it was asserted.

APPEAL from Multnomah County.

Stott, Waldo, Smith, Stott & Boise, for Appellants.

R. & E. B. Williams, Caples & Mulkey, and *J. K. Kelly*, for Respondents.

STRAHAN, J.—The plaintiffs prosecute this action against the defendants to recover two thousand two hundred dollars and interest, as damages for the alleged breach of a covenant in a deed made by the defendants to plaintiffs. The deed containing the covenant declared on purports to convey to the plaintiffs the west half of the southwest quarter of section 5, T. 1 S., R. 3 E., in Multnomah County, for the expressed consideration of two thousand two hundred dollars. By the terms of the deed the defendants covenanted with the plaintiffs, "and their legal representatives forever, that said real estate is free from all

16 388
22 187
19* 66
21* 47
20* 555

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encumbrances, and that we will, and our heirs, executors, and administrators shall warrant and defend the same to the said Hiram Brown and C. H. Page, their heirs and assigns forever, against the lawful claims and demands of all persons whomsoever." The breach alleged in substance is that the defendants had not at the time of the execution of said deed, or ever at any time, a good and sufficient or any title to said real property, or any part thereof, and the plaintiffs have since been ousted and dispossessed of said property by a person having lawful right and title thereto. It is then alleged that at the time said deed was executed the United States owned said lands, and had a fee-simple title thereto; that in August or September, 1886, and prior to September 4, 1886, the said premises being then subject to pre-emption under the laws of the United States, one Karnstad being a person then entitled to take said land under the pre-emption laws, duly entered and settled upon the same under the said pre-emption law with the intention of taking the same as a pre-emption claim, and ousted and dispossessed the plaintiffs from said land, and ever since have and now do retain the possession of the whole thereof, and exclude the plaintiffs therefrom; that on September 4, 1886, said Karnstad duly filed with the register of the land office of the United States at Oregon City, Oregon, his written statement describing the said land, and declaring his intentions to claim the same under the pre-emption laws, having first made the oath required by law in that behalf upon the said register, and said Karnstad is now in the possession of the whole of said premises, rightfully and lawfully claiming the same under the said pre-emption laws. The amended answer denies the allegations of the complaint, except the execution of the deed.

As a separate defense the amended answer alleges in substance that the premises described in the deed were within the twenty-mile limit of the withdrawal of February 16, 1870, for the benefit of the Oregon and California Railroad Company, whose right to said land attached October 29, 1869, by virtue of the Act of Congress of July 25, 1866, and of a subsequent act of June 25, 1868; and that by virtue of said acts the said O. & C.

R. R. Co. became the owners of said land in fee-simple on the twenty-ninth day of March, 1870; that on the day last aforesaid said O. & C. R. R. Co., for the consideration of five hundred dollars, sold said land to the defendant E. O. Corson and gave him a certificate of such sale, which certificate with said land the defendant sold and assigned to the plaintiffs for nine hundred and fifty dollars, and no more, and on the eighteenth day of April, 1882, said railroad company conveyed said premises to the plaintiffs by deed. It is also charged in the answer that Karnstad entered on said premises by the procurement of the plaintiffs for the purpose of enabling them to sue the defendants on the covenants in said deed, and that Karnstad is in the possession of said lands as the agent and servant of the plaintiffs. Considerable documentary evidence both from the local land office at Oregon City and the general land office was introduced. The plaintiffs to prove title out of the defendants when they made the deed, and to show that the O. & C. R. R. never acquired title to said lands by virtue of the grant made for its benefit of July 25, 1866, offered in evidence pages 160 and 161 of the register of declaratory statements on file in the land office at Oregon City.

The caption to this statement is as follows: "Register of declaratory statements under act of Congress of September 4, 1841, and amendments thereto." Opposite the number 650 and under the head of "name" is "Joseph Ross"; in the column headed "date of settlement" are the words "20 May, 1859"; in the column headed "when filed" are the words and figures "21 May, 1859"; in the column headed "part of section or legal subdivision" are the figures and letters, "W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, section 5, and E. $\frac{1}{2}$, S. E. $\frac{1}{4}$, section 6, 1 S., 3 E." It also appears from a letter written by the commissioner of the general land office, under date of June 17, 1880, to the register and receiver at Oregon City, that on April 23, 1877, the defendant E. O. Corson made application to enter a part of the land described, and made proof and payment and obtained certificate No. 1538. In this letter the commissioner says: "Under the present rulings of this office, said homestead entry having been made subsequent

to the date of the withdrawal of the land for railroad purposes, did not affect the status of the tract in question. Mr. Corson's application to enter the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 5 must be rejected, as the record shows that at the *time of the withdrawal* the tract was *public land*." After this ruling by the department that at the time of the withdrawal the land was public land, Corson purchased it of the railroad company.

The act of Congress under which the defendant Corson claimed to have derived title through the railroad company is the act approved July 25, 1866, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon." By the second section of the act it is provided "that there be and hereby is granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line . . . every alternate section of public lands, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, *pre-empted*, or otherwise disposed of, other lands designated as aforesaid shall be selected by said companies in lieu thereof under the direction of the secretary of the interior, in alternate sections, designated by numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections. . . ." The main question at issue, therefore, seems to be, whether or not the land described in the deed was *public land* at the time the grant to the railroad took effect. On this question and in respect to this identical tract of land the commissioner of the general land office has decided both ways.

In Corson's contest with the railroad company, he decided it was *public land* where the railroad company attached, and in the contest of the *Railroad Company v. Karnstad*, it was held in effect that at the time the railroad grant took effect the same land was not *public land*. These decisions are in conflict and seem to be entirely irreconcilable. Nor is it necessary that we

should attempt to reconcile them. If the lands described "had been granted, sold, reserved, occupied by homestead settlers, *pre-empted*, or otherwise disposed of" prior to the time the company's rights attached under the grant, then such lands were excepted out of the grant, and the railroad never acquired any rights to them whatever. Without referring to the decisions of the land department to that effect, this principle seems to be clearly enunciated and decided in *Kansas Pacific Railway Company v. Dunmeyer*, 113 U. S. 629.

The only evidence offered that said lands had been *pre-empted* at the time the rights of the railroad company attached is the certified "copy of the form of pages 160 and 161 of the register of declaratory statements on file" in the Oregon City land office, which has already been referred to. It seems to me this paper does not tend to prove that the land described in the deed had been *pre-empted*. It contains none of the facts essential to be shown to entitle a settler to a *pre-emption*. The qualifications of a *pre-emptor* are prescribed by section 2259 of the Revised Statutes of the United States, and are briefly: He must be the head of a family, or widower, or single person over the age of twenty-one years, and a citizen of the United States, or he must have filed a declaration of intention to become such as required by the naturalization laws; he must make a settlement in person on the public lands subject to *pre-emption*, and inhabit and improve the same, and he must erect a dwelling thereon.

By section 2260 certain persons are rendered incapable of acquiring any right of *pre-emption* under the laws of the United States. These are: (1) Any person who is the proprietor of three hundred and twenty acres of land in any State or Territory; or (2) any person who quits or abandons his residence on his own land to reside on the public lands in the same State or Territory.

Section 2262 of the Revised Statutes provides: "Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the receiver or register of the land district in which the land is situated, that he has never had the benefit of any right of *pre-emption* under section 2259; that he is not the owner of three hundred and twenty acres of land in any State

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or Territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself. . . . And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the general land office, either of which shall be good and sufficient evidence that such oath was administered according to law."

The question, therefore, arises whether or not there was any evidence submitted upon which to base the instruction asked by the appellants. That instruction is as follows: "That said admission of the parties and said testimony, as a matter of law, establishes the fact that the said land was not embraced in the grant to the Oregon Central Railroad Company by said act of Congress, and that the O. & C. R. R. Co. acquired no interest in said land, and that the deed from the O. & C. R. R. Co. to plaintiffs passed no interest in said land to plaintiffs."

If the evidence offered proved that at the time the railroad grant took effect a valid pre-emption existed on said lands, then, clearly, the instruction asked should have been given. On the other hand, if such was not the effect of the evidence offered, the court did not err in refusing said instruction. As has been shown, the laws of the United States have fully and clearly defined who may take a pre-emption, who shall not, and the manner in which a right to the land shall be acquired. A pre-emption is a right derived wholly from the statute, and in order to acquire such right, a substantial compliance with the statute must be shown. In no other way could such right exist or be acquired. In other words, unless the statute granting pre-emptions to actual settlers on the public lands was substantially complied with by Ross, it cannot be said that the lands mentioned in the deed had been *pre-empted* at the time the railroad company's grant attached, and unless such lands had been so

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pre-empted they were not taken out of the terms of the grant and passed to the company.

It is useless to point out or enumerate the particulars in which the papers offered fail to show a compliance with the statute. They are entirely silent on each and every essential requisite. I do not think that an exact and technical compliance was necessary; but a substantial compliance, one that showed that the conditions existed which would enable the pre-emptor to acquire the land under the law, and that he had performed at least enough on his part to give him some inchoate right to the land. If the papers existed which showed a right in Ross they ought to have been produced, or if lost that fact could have been proven, and secondary evidence of their contents could have been offered. But nothing of this kind was done or attempted. All we have is the copy of the form of pages 160 and 161 of the "registry of declaratory statements on file." This I suppose, to be a mere memorandum made by some clerk in the office, or by the register, of the fact that a declaratory statement had been filed. But why not produce the declaratory statement itself, or a copy of it.

It would surely be better evidence of the existence of this pre-emption claim than the memorandum offered. And for the like reasons, in the absence of record evidence of the existence of a valid pre-emption claim on the land described in the deed under the admissions contained in the record, the said land passed to the railroad company under their grant, and the court did not err in so declaring to the jury. The plaintiffs do not allege or claim that they were actually evicted or ousted by judicial process. Their contention is, that at the time the covenant sued on was made, there was a paramount title outstanding in the United States; that Karnstad had succeeded to that title, and that they have succeeded him. This, I think, under the authorities, they might do, if he had acquired a title better than plaintiffs' title, but they must by their proof negative the existence of title in the defendants when they made the covenant. In addition to this, they must show that such outstanding paramount title was asserted.

It is true when such title is in the United States as against one having no right, the laws of the United States may be a sufficient assertion of such hostile title; but I doubt it, where the title of the United States is attempted to be acquired by a pre-emptor, and that through and by the assistance of one of the covenantees in the deed. In this case, one of the plaintiffs testified that he paid the register and receiver's fees at the land office for Gunder Karnstad, and assisted him with money in the erection of a house upon said land, and that what he did in assisting Karnstad in taking said claim was wholly a matter of friendship to said Karnstad, and for no other purpose. This looks more like the plaintiffs rather invited and aided the assertion of said claim, than the unwilling and reluctant surrender to a *bona fide* outstanding superior title. But the view taken renders the consideration of this aspect of the case unnecessary.

The judgment must therefore be affirmed.

LORD, C. J., does not concur.

Petition for rehearing.

[Filed July 28, 1888.]

THAYER, C. J. — The main question involved in this case is whether the appellants proved a breach of the covenant of title alleged in their complaint in the action. The covenant is a general warranty of title against the lawful claims of all persons. I used to suppose that such a covenant would not be regarded as broken without the covenantee having been evicted from the granted premises by a paramount title; but by some kind of logic which I fail to appreciate, the courts have held that there need be no actual eviction shown, and that where the outstanding title is proved to be in the government, it will be sufficient without proof of a constructive eviction even. There was no ouster of the appellants proved in this case, beyond an attempt upon the part of Karnstad to pre-empt the land; and it might reasonably be inferred from the evidence that the appellants encouraged him to do that. The United States may never claim the land, and if a recovery can be had upon such proof, the

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appellants could have kept the land, and also have claimed a return of the consideration money and interest. The covenant, so far as I can see, was as effectually broken when the deed was executed as it was at the time the action was commenced. That kind of doctrine tolerates injustice, especially in this case.

If the respondents had been notified that Karnstad was attempting to pre-empt the land, they would have had an opportunity to contest his right to do so, and probably been able to defeat him in his efforts in that direction. The register and receiver would not have been likely to have permitted his filing to stand under the circumstances, and in view of the rulings which they had already made in regard to the *status* of the title to the land. The respondent S. O. Corson endeavored to enter the land as a homestead, and the land department upon a contest instituted by the Oregon and California R. R. Co. had decided that it belonged to the latter; thereupon said Corson purchased it from the company, and subsequently executed the deed to the appellants containing the covenant in question. Ross, who is alleged to have filed upon the land May 21, 1859, made no claim to it, and the company by assuming to convey it debarred itself from claiming *lieu* land in its stead.

In such a state of affairs, the land department, unless it is organized to make inconsistent rulings and to complicate titles, would have rejected Karnstad's filing and confirmed the appellants' ownership. I make these allusions not with a view of departing from established precedents, but by way of protests against such an invasion of the general rule upon the subject as will occasion injury. It might not be the wisest policy to require an eviction by legal process in all cases, though the maintenance of it to that extent would often prevent collusion. It may, perhaps, be safe enough to allow a recovery for the breach of such a covenant where the covenantee has given up the possession of the land to the claimant of the alleged paramount title, if the covenantee is required to establish by clear and unequivocal proof that such claimant was the absolute owner of it; but no such recovery should be permitted when the question is left in doubt. Hence, the appellants were not entitled to recover in the action

without establishing by proof that the land in question was pre-empted when the grant was made to the railroad company. Their counsel claim that they did prove that fact when they introduced in evidence the copy of the entry in the register's books in the land office at Oregon City, which is referred to in the opinion delivered herein. The majority of the court was of the opinion that a copy of such an entry was not competent evidence.

Said counsel in their petition for a rehearing concede that it may not have been the best evidence, but claim that it was introduced without objection, and was sufficient evidence of the fact, and they cite section 745 of the Code to show that entries made in public or other official books, etc., are primary evidence of the facts stated therein. That is the general rule as to entries in public books independently of the statute. Mere certified or office copies, however, from such books are not evidence, unless where the officer is authorized to give out or certify copies. (Part 2, n. 163, to p. 163, 3d ed., C. & H. notes to Phillips on Evidence.) But if we yield to counsel the full benefit of the proof which the entry furnishes, does it establish that Ross had pre-empted the land in question when the grant was made to the railroad company? Is such an entry evidence of any fact of which the officer has no personal knowledge, and is not required to determine from the statement contained in the entry? It seems to me not. It would doubtless under the rule referred to be evidence that Ross had filed a declaratory statement, to the effect that it was his intention to claim the tract of land as a pre-emption right. Under the act of Congress upon the subject, it would be proof that he had taken the preliminary step under the act, entitling him to purchase it in preference to others. The statement may have shown that Ross claimed to be a settler upon the land, and a qualified pre-emptor; but that would not prove such settlement or qualification, nor authorize the register to infer it. Those matters must be established when the final proof is made in the mode pointed out in the act.

'Such a statement is no evidence upon which the register and receiver are authorized to issue the final papers, giving the

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claimant a duplicate of the receiver's receipt for the money paid. It is a mere *caveat*, notifying the register not to allow any other party to enter the land as a pre-emption or homestead until the declarant is heard. If the register was to undertake to find from the statement that the declarant was a settler upon the land, that he was the head of a family, or was qualified in the other respects, it would be *extrajudicial*. How, then, could it be inferred from the entry that Ross had settled upon the land, and possessed the various qualifications referred to? This view was announced substantially in the former opinion; but appellants' counsel insist it is erroneous. They say that "the segregation or reservation is the *quasi* judicial act of the register of the local land office, based upon the application of any one who can satisfy the register in the manner required by law that he has the lawful qualifications, and has taken the step necessary to constitute him a settler. Under the law and rules of the department, the segregation or reservation does not take place until this evidence is furnished, then it is noted on the maps of public surveys, and recorded in the proper book of the local office where the land is situated. The land is then reserved, segregated, or otherwise appropriated. After that record is made no other filing or entry will be permitted, except after a contest instituted in the manner prescribed by the rules against the first claimant, service upon him, and a trial of his right." But I cannot believe that the mere filing of the declaratory statement furnished evidence sufficient to satisfy the register that Ross had the lawful qualification, and had taken the step necessary to constitute him a settler upon the land; nor does it appear that the land was noted upon the maps of the public survey, and a description of it recorded in the local land office, as counsel would seem to think would be inferred. I do not believe that said copy of the entry in the books of the office authorizes any such inference. If Ross had been shown to have been lawfully qualified to pre-empt the land, and to have settled upon and improve it as required by the act when the statement was filed, there might be some grounds for claiming that it was excepted out of the grant to the railroad company. But I think

it requires more proof to establish that it was "pre-empted" than the copy of the memorandum referred to.

The counsel appear to claim that because the entry in the book of the office of the register would prevent another person from taking steps to pre-empt the land, without instituting a proceeding to have Ross' filing canceled, therefore the grant to the railroad did not affect it. The grant and an attempt upon the part of another person to pre-empt the land after Ross had filed on it stand upon a different footing. Congress is invested with full power to dispose of the public lands, and it may do so irrespective of any attempt by a party to pre-empt, or enter them as a homestead, unless a right actually vested and existed in favor of such party when the grant was made.

The bare filing of a declaratory statement to pre-empt those lands, unless the declarant were shown to be a qualified pre-emptor, and to have complied with the law upon the subject, would not prevail against such a grant. In this case the grant to the railroad company included the land in question; but if it were found to have been granted, sold, reserved, occupied by a homestead settler, pre-empted, or otherwise disposed of, then other lands were to be selected by the company in lieu thereof. Was the land *shown* to have been *pre-empted* prior to the grant? This question must be kept in view in determining the case, and it turns entirely upon the meaning of the term "pre-empted" as used in the grant. Ross did not complete his title to the land. His filing is shown to have been declared abandoned August 18, 1870, but at what time it was abandoned does not appear. It seems to me that it cannot reasonably be claimed that he pre-empted the land, or that he did more than to *attempt* to pre-empt it.

The grant does not provide that, "when any of said alternate sections or parts of sections shall be found to have been *attempted* to be pre-empted, other lands . . . shall be selected," etc., and unless an attempt to *pre-empt* and *pre-empted* are synonymous, the grant to the railroad company must prevail. I should be inclined to hold, however, that if Ross were shown to have possessed the requisite qualifications, and had complied with the

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conditions of the act up to the time of the grant, although he had not made his final proof and payment of the price of the land, the railroad company would not be entitled to it. But those facts should be shown with as great particularity and authenticity as is required in making final proof, in order to obtain the patent. The claimant's *ex parte* declaration to the register, that he was legally qualified under the law, had complied with its provisions, and intended to claim the tract of land as a pre-emption right, would hardly be sufficient proof to bring it within the exception contained in the grant, either in a contest in the land department, or before the courts.

The petition for a rehearing should therefore be denied.

STRAHAN, J.—The plaintiffs have filed a petition for rehearing, in which they seem to overlook the real question upon which our previous decision rested. The question contested arises upon the refusal of the court below to instruct the jury, at the plaintiff's request, that said admissions of the parties, and said testimony as a matter of law, established the fact that the said land was not embraced in the grant to the Oregon Central R. R. Co. by said act of Congress, and that the O. & C. R. R. Co. acquired no interest in said lands, and that said deed from the O. & C. R. R. Co. to the plaintiffs passed no interest in said land to plaintiffs. The "admissions" referred to in this instruction were made upon the trial, and were to the effect that the O. & C. R. R. Co. succeeded to all the rights of the Oregon Central R. R. Co. to the land grant provided for in the Act of Congress of July, 1866, and that neither the said last-named company nor the said E. O. Corson ever had any title or interest in said property other than such as it, or he, acquired under said act of Congress and the amendments thereto.

It was further admitted that prior to the execution of said deed by defendants to plaintiffs, said E. O. Corson had purchased from said O. & C. R. R. Co. whatever rights it had to said land, and had received its certificate therefor. That at the time of the execution of said deed, said Corson assigned said certificate to the plaintiffs, and subsequently the said railroad

company, in pursuance of said certificate, executed and delivered to the plaintiffs a deed of said land. It thus appears that the plaintiffs have an indefeasible title to said lands, unless the same is defeated by the papers referred to.

The court was required to declare that this testimony as a matter of law defeated that title. In refusing to do this we have held that the court did not err, and we adhere to that opinion. The papers offered had the effect claimed for them, or they did not. There is no room for any middle ground under the claim of secondary evidence. It must be remembered that the plaintiffs were bound to prove title out of the defendants at the time the defendants signed the deed, or fail in their suit. To do this it devolved upon them to prove that the land described was excepted out of the railroad grant in some one of the ways specified in the act. They attempted to do this by introducing this documentary evidence. To take it out of the grant, then, the land must have been *pre-empted*. How? By a compliance with the law granting a pre-emption by a qualified settler.

In no other way can such right be acquired or have any existence; and to prove such acquisition something more is required than the naked entry upon the register. If such entry were made by the officer in that book without the filing of the antecedent papers showing compliance with the law, it would be a mere nullity, and would confer no right on any one, nor would such an entry prejudice the United States or their grantees. In such case the land would not be *pre-empted* within the meaning of the statute, nor would any private right whatever have been acquired in the same. I fully concede that if it were shown that Ross filed the paper required by statute, he would have acquired an inchoate right to the land, and whether he acted in good faith or not the case would have been within the principle of the cases cited; but in the absence of any showing whatever on that subject, the court cannot declare, as a matter of law, that the entry in the book has all the force and effect of an actual settlement on the land, and the filing of the preliminary papers.

It is not perceived how section 745 of the Code aids the

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plaintiffs. The difficulty is, that neither in this copy of the register, nor from any other document offered in evidence, is there a particle of evidence tending to prove several of the essential requisites of a valid pre-emption. Without such proof the plaintiffs failed to prove title out of the defendants when they made the deed in question. This failure could not be supplied by the instruction asked, which would have been its legal effect had it been given.

The rehearing must therefore be denied.

[Filed July 2, 1888.]

JAMES F. BEWLEY, PLAINTIFF, v. WILLIAM CHAPMAN AND GEORGE BERRY, DEFENDANTS.

BOUNDARY, EVIDENCE OF.—Where in a disputed boundary, the question to be determined rests wholly on facts, and there are circumstances inherent in the case of weight and importance, which are corroborated in substance by witnesses whose long residence in the neighborhood and opportunity to know give value to their testimony, *held*, sufficient to establish such boundary.

APPEAL from Yamhill County.

George H. Durham, W. L. Bradshaw, and H. Y. Thompson,
for Respondent.

McCain & Hurley, for Appellants.

LORD, C. J.—This is a suit in equity to determine the boundary lines between the lands of the plaintiff and the defendants, under the provisions of the Act of 1887 relating to that subject. (Or. Code, § 506.) The plaintiff is the owner in fee of the donation land claim of Solomon Eades, and claims that the eastern boundary of said claim is a straight line from its southeastern corner to its northeastern corner as shown by the government survey, and that such boundary as thus drawn and described is the west boundary of the Chapman claim and the Lynch claim now owned by the defendant Berry. The defendants claim that the line in dispute was surveyed and located in 1852 by the government, and that Eades and Chapman built a partition fence between their respective claims on said line, and

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that a continuation of said line southerly in the same course to the southeast corner of said Eades claim properly describes the line between the said Eades claim and the lands of the defendant Berry.

A good deal of evidence was taken, and the court below, after hearing the respective arguments of counsel, made its findings and rendered a decree thereon in favor of the plaintiff, and in accordance with the requirements of said act. To reverse this decree and establish the boundary line as claimed by the defendants is the object of this appeal. We shall not attempt to go into the details of the evidence, or to cite largely from it, for that would only encumber the record, without serving any useful purpose. As the case stands it will probably be as well to consider, first, the grounds and the evidence upon which the defendants claim the true boundary line to be as alleged. It is admitted that the Eades donation claim is the older of these donation claims, and that those of the defendant are adjoining, and necessarily that the east line of the Eades donation claim must be the west line of the Chapman donation claim, and the land of Berry as now owned by him. The contention of Mr. Chapman, one of the defendants, is based on his own evidence, and some other, corroborative in certain particulars, to the effect that after the first government survey, and when the corners were known, that he and Mr. Eades built a partition fence on the line thus located, and that when the final survey was made by the government the fence erected by them corresponded to the line then established as the east line of the Eades donation claim and the west line of his donation claim.

In 1862 Eades died, and there is nothing in the record to show that he was dissatisfied with the line, or that the final survey required any change of the fence built by them to be made. In 1864 Mr. Chapman testifies that he removed this partition fence thirty feet east on his land for the purpose of opening a road, and that it so remained until about 1876, when he moved it back to the original line upon which he and Mr. Eades had built the partition fence. His case, therefore, is that the fence, as removed in 1876, represents the true boundary line between

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his lands and the plaintiff's, and this line protracted south to the southeast corner of the Eades donation claim must be the true division line between the plaintiff and the defendant Bewley. And he says in respect to the building of this fence in 1858 that it was done by Mr. Eades and himself, and that at that time the stakes or monuments set up by the government were plainly visible, and that they set up a stake with a flag upon it at the northeast corner and the southeast corner, and guided by these Eades built the north end, and that he built the south end. These facts, he claims, are sufficient to indicate with certainty where the line between these adjacent claims is, when backed by other evidence of facts which preserve its identity. But Eades is dead, and there is no other person who testifies to the location of that fence, or knows whether it was correctly established on the division line between these claims. His wife is cognizant of the fact of the building of the fence in 1858, and testifies to his removal of it thirty feet east on his land in 1864, and its removal back to the original line in 1876, and that there never was any dispute between Mr. Eades and her husband in respect to it. And one of the sons of Mr. Eades testifies that he recollects the fact of the defendant Chapman moving the fence east thirty feet in 1864 for the purpose of a road, and that the defendant Chapman and his father built the original fence from the section corners.

There are also several witnesses who testify that they assisted in removing the fence in 1876 from the place where it was then located to the original line, and that such line was distinctly traced on the ground by ground chunks, rose-bushes, and briars that still grew where the old fence originally stood. And Faulkner and Burden, who both became subsequently the owners of the Eades claim, corroborate in some measure the existence of such a line, although Faulkner says: "We just moved on the line where we supposed the line was." And again: "It looked as if it was the same." And Burden says: "It was what was called the line, and there were some rose-bushes on the line, and a few ground chunks." The fact that the fence was removed in 1876 west to a line that indicated by some

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ground chunks and rose-bushes the traces of an old fence is pretty well established, but whether this was the true division line or boundary, or whether it was the line on which Eades and Chapman had built their partition fence, is not clear, nor is it proved by these witnesses other than as before stated. That rests almost wholly upon the statement of the defendant Chapman, and the circumstances under which he narrates the building of that fence by Eades and himself is not favorable to exactness or accuracy in fixing the boundary between them, although it necessarily approximates to it as the difference now, and as found by the surveyor is not great.

Taking this evidence as true, it only indicates that these neighbors with adjoining lands put up the fence as near as they could ascertain, or at least upon which they supposed was the east line of the Eades donation claim, or their division line. There was no disputed boundary between them, or disagreement of any character, they simply put up the fence on the land as already stated, and lived up to it, on the assumption that it was the true boundary, neither claiming anything from the other, and consequently nothing to acquiesce in. There are, however, some facts, independent of the evidence of several witnesses of the plaintiff to a state of facts in contradiction of the testimony of the defendant, that tend to establish quite strongly the correctness of the line as fixed by the court below.

The Eades claim is the elder, and the east line of it, which is the boundary between these adjacent claims, must have been established by the survey before the Chapman claim may be said to have had an existence. Now by the field notes and patent, the east line of the Eades claim which forms the boundary in question is a straight line, while the line insisted upon by the evidence of the defendant would be deflected from a straight line. The field notes put the southeast corner of the Eades donation claim in the line that divides or bounds the Sparks and Lynch donation claims, and the evidence shows that the corner as fixed by the surveyor, Mr. Fenton, substantially agrees with the old fence on the line between these last-mentioned claims, which has stood for many years, and conforms to the line

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as called for by the survey, and makes the lines connect without deflection. Besides it was said at the argument, and not contradicted, that to run the east line as now established, and according to the field notes of the survey, gives as it must the proper quota of acres to the Eades and the Chapman donation claims, while to fix it as contended for by the defendants would make one of these claims less and the other more acreage than is called for. Moreover, when the situation and location of these adjacent claims are considered, the lines by which they are bounded as fixed by the government survey, and that the southeast corner of the Eades donation claim is a common point in the line between the Sparks and Lynch donation claims, it becomes apparent that to change this disputed line, or the southeast corner of the Eades donation claim from the place as located in the decree, must disturb these lines, and result in the disarrangement of boundaries of several claims and perhaps a confusion of titles. While it is true in some particulars, there was some disagreement among the surveyors, they are for all practical purposes a unit as to the location of the southwest corner of the Eades donation claim, and this is in conformity, or substantially so, with the evidence of Lynch and Sparks, and there is much other corroborative testimony by several witnesses introduced by the plaintiff.

It may be also said that there is considerable evidence contradicting the fact that Chapman ever moved the fence east, and which goes to negative his contention, yet much of the testimony introduced by Chapman in that particular is only valuable in an auxiliary way, and upon the assumption that the original fence claimed to have been built by Eades and Chapman was on the true division line. His evidence to this point is not convincing, in view of circumstances inherent in the case which overcome and outweigh it, although we may admit the building of such original fence as testified to, and the honest endeavor to fix it on the true line bounding these adjacent claims.

To sum up the whole, the result of our consideration of the case is, that the decree is in conformity with the evidence and the facts, and that this conclusion is in substantial conformity :

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with the evidence of several witnesses, whose long residence in the neighborhood and opportunity to know give additional weight and value to their testimony. We think the decree must be affirmed.

[Filed July 2, 1888.]

JOHN A. TUCKER, RESPONDENT, v. WILLIAM CONSTABLE ET AL., APPELLANTS.

BILL OF EXCEPTIONS—QUESTION NOT ANSWERED.—To present a question for review in this court, where the question to a witness is not allowed to be answered, the bill of exceptions must show by statement or recital what fact the party offering the testimony expected to elicit by the question.

EVIDENCE—COMPETENCY.—Where it becomes necessary to prove that the defendants had knowledge of a particular fact, proof that such fact was “generally known” is not competent for that purpose.

SECTION 3384 OF THE CODE—“KNOWING.”—The word “knowing,” as used in this section, does not imply exact knowledge. It is such information as would lead a prudent man to believe that the fact existed, and if followed by inquiry must bring knowledge of the fact home to him.

NOTICE—KNOWLEDGE.—Information which a prudent man believes, or has reason to believe, to be true, and which if followed by inquiry must lead to knowledge, is equivalent to knowledge. Where the rights of others are concerned, a man possessed of such information must not shut his eyes.

SECTION 3384 OF THE CODE.—If the animal was not kept for the particular purpose specified in this section, or the defendants did not have notice of such fact, and they found the animal running at large out of the enclosed grounds of the owner or keeper in any of the months specified in section 3383, they had the right to exercise the power conferred by the statute, without first taking the animal to the owner twice.

REMEDIAL STATUTE—CONSTRUCTION.—This being a remedial statute it ought to be liberally construed, for the purpose of remedying the evil against which it is directed, and of accomplishing the intent of the legislature.

APPEAL from Union County.

Baker, Shelton & Baker, and George G. Bingham, for Respondent.

T. C. Hyde, and R. Eakin & Bro., for Appellants.

STRAHAN, J.—At an earlier day in the present term this cause was affirmed without argument, for the reason the appellant failed to appear or file a brief. On his application a rehear-

16	407
18	428
19*	12
23*	204

16	407
133	125
16	407
136	209
16	407
89	214

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ing was allowed, and the case has now been fully argued. The action is for damages for unlawfully gelding a stallion owned by the plaintiff, and it involves the construction of two sections of the Oregon Code.

Section 3383 is as follows:—

“Sec. 3383. It shall and may be lawful for any person to take up and geld, at the risk of the owner, within the months of April, May, June, July, September, and October in any year, any stud-horse, jackass, or mule of the age of eighteen months or upwards that may be found running at large out of the enclosed grounds of the owner or keeper; and if the said animal shall die, the owner shall have no recourse against the person or persons who may have taken up and gelded, or caused to be gelded, the said animal, if the same has been done by a person in the habit of gelding, and the owner shall pay the price of so gelding.”

And section 3384 is as follows:—

“Sec. 3384. It shall not be lawful for any person or persons to geld any animal, knowing that such animal is kept, or intended to be kept, for covering mares, and any person so offending shall be liable to the owner for all damages, to be recovered in any court having proper jurisdiction thereof; but if the owner or keeper of the covering animal shall wilfully and negligently suffer said animal to run at large out of the enclosed grounds of said owner or keeper, any person may take the said animal and convey him to his owner or keeper, for which he shall receive two dollars, recoverable before any justice of the peace of the county; for a second offense double the sum, and for a third offense said animal may be taken up and gelded, as is provided in the preceding section of this chapter.”

The defendants gelded the plaintiff's horse, and this action is brought to recover damages. The plaintiff by his allegations brings his case within the first clause of section 3384, and alleges that the defendants knew at the time they gelded said horse that he was kept for the purpose specified in the statute. The jury returned a verdict for the plaintiff for sixty-five dollars, for which judgment was entered, and from which this appeal is taken.

1. A number of questions were asked various witnesses by the defendants' counsel, to which objections were interposed by the plaintiff, and sustained by the court, and to which rulings exceptions were taken; but we have several times held that such exceptions presented no questions for review in this court. That in such case, to make the exception available, it was necessary to show by the bill of exceptions what facts were sought to be elicited by the questions, so that the court might judge as to its relevancy and materiality. (*Kelley v. Highfield*, 16 Or. 277.)

2. The plaintiff asked the witness John Bates this question: "State if it was not generally known that Mr. Tucker kept his horse as a stallion?" The defendants objected to this question, which objections were overruled and they excepted. The witness then answered: "I think it was generally known. Several persons had used him for that purpose." The object of this testimony evidently was to charge the defendants with knowledge of the purpose for which the plaintiff kept the horse, and if the evidence legally tended to prove that fact, and was competent, then the exception ought not to be sustained. The word "knowing," as used in this statute, does not imply exact knowledge. I think that notice in its legal acceptation is what the statute requires. It is such information as would lead a prudent man to believe that the fact existed, and that if followed by inquiry must bring knowledge of the fact home to him.

It is not necessary that this information should be formally communicated to the party to be affected by it. But if in any way he has become possessed of such information, and it is of such a nature as to induce a prudent man to believe in its truth, he is not at liberty to disregard it, and if he does so he will thereafter act at his peril. In such case, information which a prudent man believes, or has reason to believe, is true, if followed by inquiry must lead to knowledge, is itself equivalent to knowledge. When the rights of others are concerned, a man possessed of such information must not shut his eyes. But the question and answer objected to did tend to elicit such information. Their object was to show that the fact was "generally known"—when or where does not appear—and then to ask

the jury to infer that the defendants had such knowledge. This was entirely too remote. It in no manner brings the matter home to the defendants, and without that, they cannot be affected. Under these sections the defendants might lawfully geld the plaintiff's horse if found running at large outside of the plaintiff's enclosure in any of the months specified in section 3383; and the plaintiff can only make them liable by alleging and proving that the horse was kept by him for the particular purpose specified in the statute, and that they knew it. This is a part of the plaintiff's case. For the purpose of charging the defendants with knowledge, or of such information as is equivalent to it, the plaintiff had the right to prove a full description of the horse, his age, size, color, and appearance, the manner in which he was kept and used by him, or he might prove if he could, actual knowledge of the purpose for which he kept the horse. But the evidence objected to was of neither description, and it is difficult to understand on what principle of the law of evidence it was admitted. The admission of this evidence necessarily left the jury to draw their own inferences from it; but it being incompetent, the jury ought not to have been permitted to consider it for any purpose, and the defendants' objections should have been sustained.

3. An unnecessary number of instructions were asked by the plaintiff and given by the court. To some of these instructions no legal objections could be taken. Others only tended to render the real issue obscure, while some of them were clearly erroneous. Here is one of the latter description: "At the common law no person could wound or castrate a stallion, the property of another, without laying himself liable to answer to the owner in damages. The most he could do would be to expel them from his premises, and use necessary force for that purpose, doing no unnecessary damage. But in this case the defendants may justify under our statute, but before they can do so, they must bring themselves strictly within the statutory provisions; that is to say, they must have conveyed the stallion to the plaintiff on two several occasions, unless he was of such a vicious nature that they could not do so."

This instruction does not correctly construe or expound the statute, and is not justified by its terms. The statute itself is a sufficient justification for the castration of any of the animals mentioned therein during any of the months specified, if found at large. This act is alleged to have been done in the month of April, and therefore no justification on the part of the defendants was necessary. The plaintiff accepts this construction of the statute, and by his pleadings and evidence seeks to take his case out of the operation of section 3383 of the Code, and to bring it within the inhibition of section 3384. His complaint would state no cause of action unless he brings his case within this language. The act of gelding the animals of another is lawful under this statute, if done under the circumstances and at a time therein specified. But the fatal vice of this instruction is the attempt to enumerate therein the requirements of the statute, and the omission of the essential part thereof. Under this part of the instruction the defendants would be required to convey the stallion to the plaintiff on "two several occasions, unless he was of such a vicious nature that they could not do so." And this without regard to the defendants' knowledge of the purpose for which the animal was kept, or the fact that he was kept for the particular purpose specified in the statute.

On this branch of the case, the court ought to have told the jury that if the horse was kept by the plaintiff for the purpose specified in the statute, stating it, and the defendants knew it, and such horse was found running at large out of the enclosed grounds of the owner or keeper, and such owner or keeper wilfully and negligently suffered said animal to run at large out of the enclosed grounds of such owner or keeper, the defendants had the right to convey him to his owner and keeper twice, and for the third offense they would have the right to geld such animal. But under the instruction given in every case, whether the offending animal was kept for the purpose mentioned in the statute or not, and without regard to the knowledge of the defendants that he was so kept, he must be conveyed to his owner twice before the nuisance could be abated. If the animal was not kept for the particular purpose specified in

Points decided.

this statute, or the defendants did not have notice of such fact, and they found the animal running at large out of the enclosed grounds of the owner or keeper in any of the months specified, the statute confers the right on them, or any person, to deal with such animal as therein provided. The instruction given by the court is at variance with the views here suggested, and is erroneous.

This statute is a remedial statute and ought not to receive any narrow or technical construction. Its purposes are sufficiently manifest from the language employed, and it is the duty of the court to give them full effect. These purposes are to enable the stock raiser to improve the grades of the classes of stock specified, and to place in his hands under proper conditions the means to enable him to defend his herds from the "scrubs" which infest the range in some parts of the State. There is no hardship in this. Colts are allowed to run at large until they are eighteen months old; after that, if it is desirable to keep them for breeding purposes, the owner can easily place them within his enclosed grounds.

Several other exceptions were taken during the trial, but what has been said will sufficiently indicate our views of the statute under consideration. The previous expression as to the merits of this case was given under the impression that the appellants had abandoned their appeal, and only after a very casual examination of the transcript.

Let the judgment be reversed and the cause remanded for a new trial.

[Filed July 2, 1888.]

J. M. POWELL ET AL., RESPONDENTS, v. WILLIAM HEISLER, APPELLANT.

THE JURISDICTION OF EQUITY to correct a mistake in the settlement of partnership accounts has been often exercised, and cannot be disputed. But in cases involving mistakes, arising from an alleged want of proper diligence, the jurisdiction will, in a great measure, depend upon the particular facts and circumstances.

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PARTNERSHIP SETTLEMENT.—Where a claim arising from a mistake asserted by one party and denied by the other in good faith, and the parties by mutual consent select a mode of settlement, and both act upon it, and there was at the time no inequality of footing, or means of knowledge as to the facts, nor any fraud or undue advantage or mistake made by those to whom such disputed matter was committed; *held*, that in view of all the facts a case for relief was not presented. Where a mistake is alleged, the proof of it ought to be clear and satisfactory.

APPEAL from Wasco County.

Bennett & Wilson, and Nichols & Johns, for Respondents.

E. B. Dufur, for Appellant.

LORD, C. J.—This is a suit to correct an alleged mistake in the settlement of a partnership, and to recover a certain sum specified therein.

The complaint states the terms of the partnership agreement, and a charge to the individual account of J. M. Powell of the sum of \$1,451.22, which constitutes the alleged error or mistake. It states also the facts in respect to the dissolution of the partnership by the withdrawal of the defendant, and the manner in which the alleged mistake occurred by reason thereof. The answer is a denial of the material facts, and as further defenses makes a claim for damages for failure to pay according to the terms of the dissolution for the interest of the defendant, and asks that the same be allowed as a counter-claim; that the alleged mistake in the settlement of their partnership affairs was arbitrated and settled in accordance therewith; and that at the dissolution there was a statement of account and final settlement, and that the defendants have had possession of the books, etc., ever since, etc. The reply put these facts in issue.

It appears by the evidence that prior to January 9, 1879, all the parties to this suit were residing near Prineville, and that the defendant was keeping store at that place; that by reason of previous conversations in respect thereto a partnership resulted, and that on that date the defendant sold, as he claims, one-half interest in his store and business to J. M. Powell, solely, and entered into an agreement accordingly under the firm name

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of Heisler and Powell. It is insisted by the other plaintiffs that they were silent partners, but the defendant claims that he dealt with and only knew one J. M. Powell in the affair. If they were such, the evidence indicates that the defendant did not know it. All the dealings before the formation of the partnership, and all that was subsequently done at the dissolution were conducted with J. M. Powell. That matter, however, is of little consequence in determining the issue presented by this record.

By the terms of the partnership agreement there was to be put into the business a sum equal to the value of the stock of merchandise then owned by Heisler, less his indebtedness, the amount being fixed at the sum stated; but as nothing was put in by J. M. Powell or the other plaintiffs, this sum was charged to his individual account, and constitutes the ground of the alleged mistake upon which the bill is predicated. The partnership was dissolved on February 10, 1880. For the interest of the defendant, which comprised one half of the stock of merchandise, the store notes, and accounts due the firm, J. M. Powell, as the other representative of the firm, agreed to give him a certain tract of swamp land, a certain number of horses, cows with calves, and yearling heifers, and if the same amounted to more than the defendant's interest in the store, Powell was to give him his note for the remainder. As to these terms Heisler claims that if the amount of the cattle turned over should fall short of the purchase price of his interest in the store, Powell was to make up the difference in cows with calves and yearling heifers from other sources at the prices agreed.

In this settlement for a dissolution all matters were necessarily gone over in order to ascertain the respective interests of the parties, and carry into effect the agreement by doing the acts required by it, and transferring the property accordingly. In this settlement the individual accounts of the defendant Heisler and plaintiff Powell were alone treated as representing partnership interests. The other plaintiffs each had an account with the firm, which was treated as assets of the firm. Whereupon the defendant retired from the firm, and the business was con-

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ducted under the firm name of Powell & Co., and all books belonging to the old firm were left with the new firm. Several years after this sale and settlement of their partnership business, and when the defendant had gone into business at another place, that is, in the fall of 1884, the plaintiff J. M. Powell notified the defendant that he had discovered a mistake in their settlement which consisted of the charge of \$1,451.22 as alleged, and claiming that the defendant owed him the whole of that sum. Heisler demurred to this, and contended the fact and truth was otherwise, but expressed a willingness to submit the matter to any competent book-keepers, and abide by their decision. The result was that subsequently they agreed to settle the matter in dispute in this wise. The gentlemen selected were Messrs. Croes and Hudson of The Dalles, who are claimed to be competent and expert in book-keeping, and to them was submitted a statement of the facts and the books containing the entry. They decided that the defendant should pay J. M. Powell \$725.61, being half of the original entry, and we may assume that both accepted the decision, as they acted upon it, the one paying the amount decided to be due, and the other receiving it. To be brief, nothing further occurred, except Powell seems to have received some impression that there was more due him, before the commencement of this suit. Upon this state of facts ought we to entertain this bill.

The contention of the appellant is, (1) that there was a full and final settlement of all the partnership business at the time of the dissolution; (2) that to avoid disputes and settle the matter, they submitted the question in dispute to arbitrators, mutually selected and agreed upon, and that they accepted and acted upon the same as a finality. The jurisdiction of equity to correct a mistake in the settlement of partnership accounts has been often exercised, and is not disputed.

The counsel for the defendant insists that its proper exercise is limited to cases where the party is free from negligence. That if he possessed the means of information, or by the exercise of reasonable diligence could have obtained the knowledge, the court will not relieve him. But we think in this class of cases,

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involving mistakes, arising from an alleged want of proper diligence, the jurisdiction will in a great measure depend upon the particular facts and circumstances surrounding the transaction. Mr. Pomeroy says that "even a clearly established negligence may not of itself be sufficient ground for refusing relief, if it appear that the other party has not been prejudiced thereby. It has been said that equity would never give any relief for a mistake if the party could by reasonable diligence have ascertained the real facts, nor where the means of information are open to both parties, and no confidence is reposed, nor unless the other party was under some obligation to disclose the facts known to himself and concealed them. A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the prerequisite for all species of relief." (Pomeroy's Equity Juris. § 856.) Of course, this upon the assumption that there is a mistake, and that it has been made to appear clearly and satisfactorily.

The facts show that the parties enjoyed equal opportunities at the settlement and before to ascertain the true state of the partnership affairs. To avoid the effect of this it is alleged that the plaintiffs were practically ignorant of the science of book-keeping. Nor does the evidence show that the defendant was an expert or particularly skillful in keeping accounts. As a necessity of business, he learned and managed to keep accounts correctly. In practical sense and in knowing how and what ought to be done, the defendant enjoyed no particular advantage over the other parties. There is no pretense that there was any concealment of facts, or anything intended or contrived by the defendant calculated to surprise or mislead. The original contract was made for the partnership, with a full understanding of its terms, and the entry complained of was made and remained in the books open for inspection during the period of the partnership; and at the dissolution and since the plaintiffs have had the entire custody of the books, and thus during a period of several years, the means of discovery and the opportunity to know the correctness of the calculation including this charge, or to employ some competent person to investigate it. Nor is there

any doubt but what at the settlement of their affairs and accounts they stood upon equal grounds, with equal opportunities and equal means of information.

There is no concealment or fraud or undue advantage claimed. The settlement is deliberately made, the defendant withdraws, and proceeds to another town to pursue his business on his own account, leaving the books and all the matters connected with the partnership in the hands of the plaintiff. And yet even in such a case if there was a mistake, which in effect took the property of one and gave it to another, although there was a settlement and adjustment of their accounts, I do not think it ought to be conclusive and prevent its correction. But there ought to be no doubt as to the mistake. That ought to be made to convincingly appear and be free from doubt. Now while the defendant denies the mistake, and insists upon the hypothesis that if there was their own laches ought to shut the doors of equity against them so long after the settlement of the partnership, he further insists that it being a disputed matter between them, and by mutual agreement having been referred to competent persons selected by them to investigate and determine the truth of the matter, and another settlement made according to that adjustment, the one paying and the other receiving the amount, that such adjustment must be accepted as final.

We do not doubt that the claim is asserted in good faith, nor that it is denied by the defendant in equal good faith; but it seems to us when the parties by a mutual agreement between themselves selected a mode of settlement, and both acted upon it, and there was at the time no inequality or footing or means of knowledge as to the facts, nor any pretense of fraud or undue advantage or mistake made by those to whom they committed, and agreed to abide by their determination, that such a settlement ought not to be disturbed. All compromises or settlements made of disputed matters in good faith and without fraud, equity is strongly inclined to favor and uphold. Nor will it disturb them in the absence of inequitable conduct vitiating the transaction or settlement, since the purpose is to settle the matter in dispute without judicial controversy. Now the facts narrated

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and in evidence show that several years after the settlement of the partnership affairs, the plaintiff J. M. Powell claimed that there was a mistake, and sought out the defendant. After some parley they submitted the point in dispute with all the evidence in respect thereto, and a result was reached and a settlement made in accordance therewith. Again, several years have elapsed, and it is sought to re-open the matter again, and to disregard these previous compromises and settlements. Mr. Hudson testifies that "our decision was accepted as final by both parties."

In view of all the facts we do not think equity ought to intervene, and the decree is reversed and the bill dismissed.

On petition for rehearing.

LORD, J.—We have examined the matter suggested by the motion, and do not think the proof sufficient. In principle, it is covered by what has already been said, and there is no purpose to be served by encumbering the record with a review of conflicting facts; and for this reason it was not deemed necessary to give the matter particular mention. In a word, the evidence upon which this second mistake is asserted, in view of the time elapsed since the settlement, the nature of the proof, and its contradiction by the defendant, was not of that clear and decisive character required in such cases. Besides there are equities set up by the defendant in respect to the payment which it would be necessary to investigate if this matter is to be re-investigated. We are all impressed with the conviction that the record does not present such a case as calls for the exercise of the jurisdiction invoked.

The motion is denied.

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[Filed July 2, 1888.]

STATE OF OREGON, RESPONDENT, v. CHING LING,
APPELLANT.

EVIDENCE.—An error of a court in the trial of an action, where from its nature and effect it could not possibly have injured the party against whom it was committed, is not a sufficient ground for the reversal of a judgment obtained therein; but where the error consists in the admission of improper testimony, which was liable to influence the result in any degree, an appellate court cannot disregard it.

CRIMINAL LAW—CHALLENGE OF JUROR.—Where in the trial of a criminal action the counsel for the State challenged a juror for cause, upon the ground that his name did not appear upon the assessment roll of the county for the preceding year, and the counsel for the defendant denied the challenge, and the court sustained it, *quære*, whether the challenge was properly sustained. *Held*, however, that it was immaterial whether the challenge was properly sustained or not; that if the holding was erroneous it could not have prejudiced the defendant, and was not, therefore, a sufficient ground for a reversal of the judgment of conviction.

CRIMINAL EVIDENCE.—Where upon the separate trial of one defendant, under an indictment charging him and four others with having purposely, and of deliberate and premeditated malice, killed L. Y., evidence of facts and circumstances occurring previously, from which it might be inferred that some of the defendants entertained malice toward L. Y., was offered by the prosecution and admitted by the court. *Held*, that the evidence was incompetent, as against the defendant on trial, where no showing whatever had been made connecting him in any way with such facts and circumstances, or that he was cognizant of them. *Held*, that an exception to the overruling by the court of an objection interposed by the defendant's counsel to the admission of the evidence was well taken; and that the ruling was such an error as to require a reversal of the judgment of conviction recovered in the trial. *Held*, that testimony offered on the part of the defendant as to what he said prior to his going to the place where the homicide was committed, in order to characterize his intention in going there, was not a part of the *res gestæ*, and was, therefore, inadmissible.

REASONABLE DOUBT DEFINED.—A reasonable doubt, as used in the law of evidence, defined to be a conscious uncertainty in the mind of the jury, after a fair consideration of all the proofs in the case respecting the guilt of the accused.

APPEAL from a judgment of conviction of the Circuit Court for the county of Multnomah.

W. W. Page, and *Frank V. Drake*, for Appellant.

H. E. McGinn, and *N. D. Simon*, for Respondent.

THAYER, J.—The appellant, Chee Gong, Fong Long Dick, Yee Gong, and Chee Son were jointly indicted by the grand jury of the county of Multnomah, for the crime of murder in

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the first degree. They were charged in the indictment with having, on the sixth day of November, 1887, at said county, murdered Lee Yick. They each pleaded not guilty to the indictment and demanded separate trials. The appellant was tried and found guilty of the crime charged, and upon which the judgment of conviction appealed from was entered against him. His counsel claim upon the appeal that several errors were committed at the trial prejudicial to their client, and that the conviction should be set aside and a new trial granted him.

It appears from the testimony upon the part of the State, that on the sixth day of November, 1887, in the Chinese Theater in Portland, Multnomah County, the said Lee Yick, a Chinaman, was set upon by the defendants, who were also Chinamen, and assassinated. The witnesses who testified to the fact were also Chinamen. They were Ah Kam, Boy Noy, Ah Yim, Ah How, Ah Fat, Lee Shung, and Lee Toy. Their testimony seems to be positive, that at the time and place mentioned, at or near the hour of midnight, during the performance of a play which had drawn a full house, the defendant Chee Gong, with a knife, the appellant with a hatchet, and the other three defendants with iron bars, murderously assaulted the deceased, and after a desperate struggle, Chee Gong succeeded in stabbing him in the head with the knife, and thereby inflicting upon him a mortal wound.

The appellant in order to refute this testimony called as witnesses, Ah Gong, Ah Kim, Ah Sam, Chee Jim, and Ah Joe, who severally testified that on the night of the 6th of November, 1887, they were at the Chinese Theater at the time of the affair, about a quarter to twelve, midnight, and that they had known Ching Ling, the appellant, for about two years; that on this night they sat near to him on the benches to the left of the main entrance into the theater from Second Street, opposite side of the building from where the row or killing took place, and that he did not and could not take part in the affair. That Ah Gong and Ah Kim went with Ching Ling to the theater about nine o'clock that night, and took seats to the left of the entrance, and they, and the remainder of said witnesses, testified that

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Ching Ling did not leave the place until after the homicide occurred; and Ah Gong testified that the appellant went out of the theater down the stairs, through the crowd onto Second Street to Mah Lee, corner of Alder and Second streets, where he lived and had been rooming. There was also testimony in the case in behalf of the State, and of the appellant, tending to corroborate the evidence of their respective witnesses referred to.

The first ground of error relied upon by appellant's counsel is the ruling of the court upon a challenge to a juror interposed by the district attorney. It appears that while the jury was being impaneled one John Epperly, who had been duly summoned as a juror, stated, in answer to a question put to him by the district attorney, that his name did not appear on the assessment roll for the year 1886. The district attorney, therefore, challenged the juror for cause, which challenge being denied by the appellant's counsel was sustained by the court. This ruling the appellant's counsel insist was error.

It does not appear whether or not Epperly was upon the regular panel; the presumption is that he was not, as the County Court is required to take the jury list from the last preceding assessment roll of the county, and it is presumed to have done its duty in that particular. I doubt very much, however, whether the challenge was well taken. The juror's name not being upon the assessment roll, it seems to me is no ground for challenge. The Circuit Court appears to have viewed the subject differently, and I think it would be better if the rule were in accordance with its holding. But the statute prescribes in express terms the qualifications of jurors, and their names being upon the assessment roll is not included among them. The error, however, if it were one, could not possibly have injured the appellant, and is therefore no ground for reversing the judgment.

The next ground of error is the admission of testimony alleged to be improper. It appears that one Berger was called as a witness on the part of the State, and testified that he kept the Saddle Rock Restaurant, No. 220, First Street, Portland; that he knew Lee Yick in his lifetime; that Lee Yick worked for

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witness with Chee Gong and his cousin; that he was acquainted with Chee Gong about three months and a half; that Chee Gong was in his employ—was his dish-washer. The witness was then asked what he knew about Chee Gong's having met with Lee Yick, and to state all about it; what was said and done. This question was objected to by the appellant's counsel as incompetent and immaterial, whereupon the district attorney modified it so as to confine the inquiry to Chee Gong's action, but the appellant's counsel still insisted upon their objection. The court overruled the objection, to which the appellant's counsel saved an exception.

The district attorney then asked the witness to state how Lee Yick came to meet Chee Gong, and what was done by him at that time. The appellant's counsel as preliminary to their objecting to the question asked the witness if Chee Gong was present, and upon his answering "that he could not say," objected to the testimony as incompetent and immaterial. The court overruled the objection, to which the appellant's counsel excepted. The witness then testified that Chee Gong did not do right and he discharged him; that Chee Gong came to work for witness in September, and worked only a few weeks; that five men left with him; that when he discharged these fellows "they were very angry; and when they came to get their pay they met Lee Yick, and Chee Gong talked very loud as though he was very angry; that witness did not think he owed them as much as they claimed; that Lee Yick worked for witness until he was killed; that five men came with him in place of the five men that left; that Lee Yick procured the men who took the place of Chee Gong and those who left; that Lee Yick entered witness' employment on the 3d of October last, and Chee Gong and the men with him left on that day; that Lee Yick went to work that morning; that witness could not say for certain whether he had the appellant in his employ when Chee Gong was there, but thought he was night cook; that he looked like the night cook that was there then.

The witness, upon his cross-examination, when asked what Chee Gong was angry about, said that he seemed to be angry :

because witness discharged him; that he claimed a dollar more than witness paid him, and that rather than have a fuss, and to settle it, he paid him a dollar. The object of this testimony, evidently, was to show that the appellant and the other Chinamen charged with the offense bore such malice towards the deceased as to prompt them to commit the homicide. There could have been no other purpose for introducing it. The testimony was not sufficient to have had any weight whatever as against white persons. But very few of them at most could be found credulous enough to believe that *their* race, in consequence of such an occurrence as happened to Chee Gong and his friends, in the affair of their discharge from employment at the restaurant, would have been induced to plan and execute a murder. As to Chinamen, however, it is different. Those among us have exhibited such a peculiarity of temperament, that a circumstance of that character would incite a strong suspicion against them.

It was a circumstance sufficient, in the opinion of a great majority of our people acquainted with the customs and disposition of the lower class of the Chinese, to induce them, through a spirit of revenge, to conspire against the life of one of their fellows, and commit deeds of violence. The evidence as to whether the appellant assisted in the killing, as testified by witnesses on the part of the State, or as to whether he occupied the place in the theater the witnesses on his part testified that he did, and took no part whatever in the fray, directly conflict. Taken by itself, it would be very difficult to determine where the truth lay. Hence the testimony as to the discharge of Chee Gong and associates from the employment, as to Lee Yick and his friends superseding them in the employment, as to Chee Gong exhibiting temper on the occasion, and the possibility of the appellant being one of the five Chinamen discharged, and of his probable participation in the anger manifested by Chee Gong, was very important as a make-weight in favor of the evidence on the part of the State. Unless, therefore, the testimony referred to was competent, its admission was such an error as would necessarily affect the appellant injuriously. I do not think that the testimony admitted was competent as against the

appellant. It was not proved that he constituted one of the five Chinamen discharged, or was present when Chee Gong exhibited passion on account of his discharge.

There was some testimony introduced by the district attorney to the effect that the appellant had been in the employ of Berger, the keeper of the restaurant, but it was vague and uncertain. The evidence which the district attorney sought to establish was indirect in its character; it was an inference to be deduced from facts proved. The inference sought to be drawn in this case, and the jury allowed to make, was that the appellant entertained malice against Lee Yick, and hence had a motive in killing him. The testimony was introduced to establish facts which would authorize such an inference; and the Circuit Court virtually held, when it overruled the objection of appellant's counsel to its admission, that it was sufficient for that purpose, at least the jury must have so understood it. This clearly was error. The facts proved as against the appellant did not tend to show that he was one of the party who was discharged, or that he affiliated with them to any extent, or that he was present when Chee Gong and his friends left Berger's employment, or had ever heard of the matter. The evidence in regard to all of those particulars is entirely deficient. It merely shows, as before suggested, that the appellant may have been in Berger's employ, though the latter said that he could not say *that* for certain, though he was night cook there in September; that he looked like the night cook that was there then. Whether he left when Chee Gong did, or had gone before, or went afterwards, does not appear; nor does the evidence disclose facts upon which such a conjecture can be founded. No such inference, therefore, as that suggested could be drawn as against the appellant; and the testimony as against him should have been excluded. The judgment of conviction must be reversed and the cause remanded for a new trial.

This view renders it unnecessary to consider the other grounds of error assigned, except for the purpose of aiding the Circuit Court in the re-trial of the case. I do not think that the exception to the ruling upon the offer of the appellant's counsel to prove by Ah Gong what was said and done by the appellant at

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Mah Lee about going to the theater on the night of the homicide, and the occasion of his going there with the witness that night, was well taken. The offer did not disclose that what the appellant said and did at the time referred to was a part of the *res gestæ*, it was too remote. (*State v. Glass*, 5 Or. 81.) We believe, however, as we intimated in *State v. Mah Jim*, 13 Or. 235, that it would be much better in the trial of Chinamen for a capital offense, where the proof depends upon the Chinese witnesses, to allow the accused a wide range with a view of ascertaining the truth.

An attempt to apply strict technical rules in such cases is too apt to result in a sacrifice of substance to form. The law was instituted to secure justice, and its design and purpose should not be suffered to be defeated by a strict adherence to formal rules in its administration. In cases of homicide among these Chinamen, it is almost impossible to ascertain who the guilty parties are. I am satisfied that they will not hesitate to conspire and make those answerable for outrages who had no hand in perpetrating them. It behooves courts and juries in the trial of these people for capital offenses, where the evidence of their guilt depends mainly upon the testimony of their own kind, to be prudent, vigilant, and discriminating; otherwise they are liable to be made use of as a means to carry out the machinations of the crafty and designing.

Tribunals of justice have an important responsibility to discharge in such cases. If they are stolid and persistently adhere to formality, they subject themselves to imposition through artifice and cunning, and permit the course of justice to be prevented. Juries should be loath to convict a Chinaman of murder in the first degree upon Chinese testimony; not wholly on account of a tender regard for the life of the accused, but also from a respect and reverence for truth and justice. If we were disposed through a dislike of the race to consider the life of a Chinaman as a trivial matter, still we would have no right to immolate justice upon the altar of our prejudice.

The other grounds of error relate wholly to the instructions given by the court to the jury. I have read the instructions

carefully, and think the objections to them are more critical than sound. There are twenty-two of them in all beside those given in a modified form, which were requested by the appellant's counsel. The strongest objection to the instructions is that they cover too much ground, and many of them were inartificially drawn. Trial courts should instruct juries with reference to facts in the particular case before them.

It is highly proper in a criminal case to define the crime charged which the evidence tends to substantiate. In this case the testimony upon the part of the prosecution tended to prove, by the direct act of killing, the commission of the crime of murder, within one of the degrees specified in the statute. If the appellant was guilty of anything, it was of making, in connection with the four other Chinamen, a direct murderous assault upon Lee Yick and taking his life. It was unnecessary, therefore, to explain to the jury anything about murder under any other circumstances, or as to what would constitute justifiable or excusable homicide. There was no pretense that the act was done in the perpetration, or attempt to perpetrate "rape, arson, robbery, or burglary," or any other unlawful act; nor that it was justifiable or excusable. Nor were there any circumstances shown which would authorize the jury to find that it was done without design to effect the death of Lee Yick. Hence all that part of the instructions relating to those matters should have been omitted.

The exception to the fifteenth instruction has been urged with much force and apparent reason. That instruction is as follows: "You cannot find the defendant guilty of murder in the first degree, unless you are satisfied beyond a reasonable doubt that he purposely and of deliberate and premeditated malice, or in the commission, or attempt to commit rape, arson, robbery, or burglary, killed the deceased, or aided, assisted, or abetted in killing the deceased as charged in the indictment." The qualifying language in that instruction, "or aided, assisted, or abetted in killing the deceased as charged in the indictment," would, in my opinion, render it in the abstract erroneous. Aiding, assisting, or abetting the killing of a human being would not be

murder in the first degree, unless done purposely and of deliberate and premeditated malice. But from other instructions given in the case, it is evident that the court intended and the jury understood that the "aiding, assisting, and abetting" in the killing, to constitute that degree of murder must have been done in that manner. An exception to an instruction as to what constituted a reasonable doubt was also insisted upon by appellant's counsel as error.

Courts and law-writers seem to have had considerable difficulty in defining this phrase, consisting of two simple words used in the law of evidence. They have explained it a great many times, but always have a sort of lurking impression that they have not rendered its meaning as satisfactory as they could have desired. The definition of the expression given by the court in the instruction complained of is as follows: "A reasonable doubt is not every doubt; it is not a captious doubt; it is such a condition of the mind, resulting from the consideration of the evidence before you, as makes it impossible for you as reasonable men to arrive at a satisfactory conclusion. It is not a consciousness that all conclusions arrived at may possibly be erroneous; but such a state of mind as deprives you of the ability to reach a conclusion that is satisfactory." This definition substantially has been approved by acknowledged authority upon the subject. It is, however, awkwardly expressed, and its style is too metaphysical to be understood by the average juror.

I think we have heretofore indicated a preference in favor of the one given by Chief Justice Shaw, in *Commonw. v. Webster*, 5 Cush. 295; 52 Am. Dec. 711, as follows: "It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." And it was thought by some learned reviewer of that case that the terms might perhaps be better described by saying "that all reasonable hesitation in the mind of the triers, respecting the truth of the hypothesis attempted to be sustained, must be removed by the proof." The whole difficulty has arisen in attempting to

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explain that the adjective "reasonable" does not mean, in the connection in which it is used, something different than it purports to. Trial courts usually begin their explanation of a "reasonable doubt" by telling the jury, as the learned judge did in that case, that it is not every doubt; it is not a captious doubt. Of course it could not be every doubt unless every doubt were reasonable; nor could it be a captious doubt, for such a doubt would be unreasonable.

In the trial of a party upon a criminal charge, the law does not require demonstration in order to justify a conviction; but it does require that degree of proof which establishes guilt to a moral certainty. It is not enough to show that the accused is *probably* guilty, but he must be *proved* guilty, not beyond a *possible* doubt, but beyond a *reasonable* doubt. I think it very questionable whether a trial court, in giving instructions to juries, should undertake to define a "reasonable doubt." The term "reasonable" imports its own signification, and an attempt to explain its meaning is liable to be misleading. There is no rule by which a juror can determine whether a doubt entertained by him is reasonable or not. He can only act upon his own judgment and understanding in the matter. The doubt may seem reasonable to him, and yet be utterly absurd. To tell the jury, as they were told in this case, that a reasonable doubt is such a state of mind as deprives them of the ability to reach a conclusion that is satisfactory would be no assistance to them. A prejudice or caprice might produce the same state of mind, and they not realize the distinction. In my opinion a reasonable doubt in such case is nothing more than a conscious uncertainty in the mind of the jury, after a fair consideration of all the proofs adduced, respecting the guilt of the accused.

There were other questions discussed at the hearing, and are referred to in the briefs of counsel. We have not mentioned them, for the reason that we have not deemed it necessary.

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[Filed July 2, 1888.]

MAGGIE KRAUSE, RESPONDENT, v. GEORGE HERBERT, APPELLANT.

REPLEVIN.—It is not necessary in a complaint in replevin to describe specifically the character of the property, as that it is exempt from sale upon execution, any more than it is an action of trespass or trover.

SAME—ALLEGATIONS ON.—The cause of action is complete without any statement of the reason or authority for taking the property and its exemption. Such allegations are no part of the gist of the cause of action, and are not necessary to be proved in the first instance to entitle the plaintiff to recover.

PARTIES—RECORD OF FORMER ACTION.—Where the record of a former action is offered in evidence, it cannot be objected that the former action involved other parties, when the person making that objection was one of such parties though in connection with other persons; but this has no application to a nominal party to the record, as an officer, without any beneficial interest in the subject-matter of the litigation.

APPEAL from Wasco County.

E. B. Dufur, for Respondent.

A. S. Bennett, for Appellant.

LORD, C. J.—This was an action in replevin, and the complaint is in the usual form for property wrongfully taken and detained. The defense is that the property was taken under an execution upon a judgment in favor of Atwater and Story v. the plaintiff Krause and E. W. Krause, her husband. In her reply the plaintiff traversed the new matter set out in the answer, and claimed that the property was exempt, and was so claimed at the time of the levy. There are several assignments of error, but in substance the majority of them raise the same question, which is, that all evidence tending to show that the property mentioned in the complaint was exempt, was error.

This argument seems to be based on the theory that the particular character of the property as exempt should be specifically alleged in the complaint, and that the omission to do so precludes the plaintiff from showing that the property levied upon was exempt. This position necessarily asserts that the matter of exemption alleged in the reply is inconsistent with the facts alleged in the complaint. But this is not so; and if it was, the defendant should have proceeded in some other way to get rid

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of it; but in any view it cannot affect the question involved here. Nor is it necessary in a complaint in replevin to describe specifically the character of the property, as that it is exempt from sale upon execution, any more than it is in an action of trespass or trover. Where a complaint sets forth such facts, Janes, J., said: "The cause of action was complete without any statement of the reason or authority for taking the property and its exemption. (*Butler v. Mason*, 16 How. Pr. 546.) Such allegations were no part of the gist of the cause of action, and were not necessary to be proved in the first instance to entitle the plaintiff to recover." (*Dennis v. Snell*, 50 Barb. 98.) In such case it is sufficient to allege the facts according to the form usually prescribed and followed.

The defendant has no right to insist that the complaint shall be specifically framed to enable the plaintiff to maintain her right of exemption any more than to maintain any other special right to the possession of the property. Upon the issue joined, as disclosed by the record, it was incumbent upon the plaintiff to show that she owned and was entitled to the possession of the property described in the complaint; that she was engaged in some business or employment which required the use of the same, and that it did not exceed in value the sum named in the statute; and that she had selected and reserved the same at the time of the levy, or as soon thereafter as the same became known to her. Now all the questions asked to which exceptions were taken were directed to proving some one of these matters, and specially the fact, that at the time of the levy the plaintiff designated and selected the property as exempt from sale upon execution. Under the exemption laws the plaintiff had the undoubted right to designate and claim the particular property as exempt by law from execution. This personal privilege she claimed to have exercised in time to preserve her rights and protect her property as exempt, and the proof of these facts in the present action was a part of the issue and clearly admissible. There was therefore no error in admitting such evidence.

The next assignment of error is as to the admission as evidence of the pleadings and records of a case in which the present

plaintiff was plaintiff in that action, and the present defendant was defendant therein, together with August Buchler and Joseph Frieman, who are not parties to this action. By reference to the record of that case it appears that the plaintiff here began an action in replevin in a Justice's Court to recover of the defendant here, and the defendants Buchler and Frieman, the identical property involved in the present action. In their answer the defendants denied the ownership and title of the plaintiff, and alleged affirmatively that the property belonged to her husband. The trial resulted in a verdict and judgment in favor of the plaintiff. It will be seen then that the plaintiff is the same in this action as in that, the property is the same, and that the defendant here is one of the defendants there; but in the first and in the last case he is only a nominal defendant, and without any interest in the subject-matter of the litigation.

When the pleadings and record of the first action were offered in evidence, the defendant objected to their admission, because the parties were different and the issues not the same. The court overruled the objection, and the evidence was admitted. The correctness of this ruling is the question for our determination. One of the material facts to be established in the present action was the plaintiff's ownership of the team in litigation, and the pleadings and record of the former action show on their face that this was one of the material allegations to be established in that action, and one of the issues made by the defendants, and that such issue was found against them. The object of introducing the record of the former action was not as a bar or estoppel to the present action, but as evidence of one of the material facts in issue, namely, the plaintiff's ownership of the team, which had been adjudicated between them. But in that action the defendant Herbert was not a beneficial party in interest, and was invested with no power to control the proceedings; he was only present as a party by virtue of his office as sheriff, and in no other capacity, and without any interest in the subject-matter of the litigation or fruits in the judgment. The defendants Buchler and Frieman were the legal and beneficial parties in interest, who had rights to be determined by the liti-

gation, and who are bound by the result. There was, therefore, in that action no fact adjudicated which binds the defendant in this action. Nor is the defendant litigating any right or interest in the present suit in his individual capacity; he is simply justifying as an officer under an execution issued in favor of Atwater and Story, who seeks to appropriate the property to the payment of their debt.

It is plain, then, that the judgment of the former suit cannot be used in the present action as an adjudication of the fact mentioned. It may be true that where a defendant is a party to a record with other persons as parties, all of whom have rights to litigate and an interest in the result, cannot, in another action involving the same subject-matter or issue in which he is a party, object that the former action involved other parties, when he was one of such parties. If the defendant Herbert in the former action had been a real party to the record, although with other persons, and had rights to litigate, and was in the present action litigating the same fact in his own right and in the same capacity, the fact that there were other persons as parties to such former action would constitute no valid objection to the admission of the record of such action.

In *Larum v. Wilmer*, 35 Iowa, 244, it was held that the objection that a prior adjudication pleaded as an estoppel was between other parties is not well taken, when it appears that the person making the objection was a party to the former suit, though in connection with other persons who were also parties thereto. But this can have no application to a nominal party to the record, and who, being without any right to litigate or interest in the subject-matter, constitutes no adjudication as to such party.

It follows that it was error to admit the record, and the judgment must be reversed and the cause remanded for a new trial.

[Filed July 2, 1888.]

**BUNNEMAN AND MARTONONI, RESPONDENTS, v.
MAX WAGNER, APPELLANT.**16 438
33 817

ATTACHMENT.—When an undertaking was given, and the plaintiff released and surrendered the property to the defendant, the attachment was vacated and dissolved, and the undertaking took the place of such property, and the action thereafter ceased to be *in rem*.

SAME—UNDERTAKING ON.—A bond or undertaking, as either may be prescribed by statute, to be given to secure the release of property attached, are designed to serve the same purpose and to stand upon the same consideration, and when an action is brought upon either, are governed by like principles.

SAME—DISSOLUTION ON.—If a creditor voluntarily consents to dissolve an attachment levied upon goods of his debtor, and relinquish his lien at the request of any one, the promise of such person to pay the debt thus secured is made upon a valid consideration. The surrender of the lien being a detriment to the creditor is a sufficient consideration for the promise; but to enforce such promise or engagement, it is indispensable that it be in writing.

SAME.—When, therefore, the defendant by his undertaking in writing promised and agreed to pay the amount of any judgment which the plaintiff might recover against the defendants in that action, such undertaking was founded upon a valid legal consideration which the defendant received by the surrender of the property attached, and was good as a common-law obligation.

SAME.—Bonds or undertakings intended to be given in compliance with statutes, although not done so, will if they are entered into voluntarily and founded upon a valid consideration, and do not violate public policy or contravene any statute, be enforced by common-law remedies. A bond or undertaking given to obtain the release of property seized upon attachment is not rendered invalid by irregularities in making such attachment, when the property was surrendered and the plaintiffs voluntarily consented to dissolve the attachment, nor will such irregularities defeat the liability thereon.

SAME—COMPLAINT ON.—It is not essential that the complaint set out all the facts or various proceedings which authorize the issuing of the attachment.

APPEAL from Clatsop County.

Noland & Dorris, for Respondents.

Fulton Brothers, for Appellant.

LORD, C. J.—This is an action on an undertaking. The facts are that the plaintiffs brought an action against the firm of Dipascuale and Sanginetti for goods sold and delivered to them, and levied an attachment on the property of the defendant Dipascuale. Subsequently an undertaking was given by the defendant Max Wagner, as surety, and the plaintiffs released the property and turned it over to the said Dipascuale. Before

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the action came to trial Dipascuale died, and Louis Nelson, a creditor, was appointed administrator of the estate, who was substituted in the action for the defendant Dipascuale, and an amended complaint was filed, and in due time judgment by default was taken in such action against Nelson, as such administrator, and Sanginetti. This judgment not having been paid, the plaintiffs brought this action on the undertaking given as aforesaid. A demurrer was filed, which being overruled, the defendant answered by a specific denial of the facts alleged, and issue being thus joined, the trial was proceeded with before the court by consent, and resulted in a judgment for the plaintiffs.

There are several assignments of error, and among the first to be noted is, whether the death of the defendant Dipascuale dissolved the attachment and exonerated the defendant Wagner of his liability as surety upon the undertaking. This objection is founded upon the assumption that when an undertaking is given, it takes the place of the property released, but does not discharge the attachment, and that when the defendant Dipascuale died thereafter, its effect was to dissolve such attachment, and consequently, to relieve the defendant Wagner of his liability as surety on such undertaking. But the law is otherwise. When the undertaking was given and the property was released, the bond did stand as security for the property, or took its place, but its effect was to dissolve the attachment. "By giving the statutory bond," Mr. Wade says, "the attachment is dissolved, and the action proceeds to judgment as an action *in personam*." And again: "When a bond is given to pay whatever judgment may be rendered, and is approved and the property released, the attachment is dissolved, and it is no longer a proceeding *in rem*, and no plea in abatement traversing the ground of the attachment can be entertained." (Wade on Attachment, §§ 183, 186.) When, therefore, the undertaking was given, and by reason thereof the plaintiffs released and surrendered the property to the defendant Dipascuale, the attachment was dissolved, and the undertaking took the place of such property, and the action thereafter ceased to be *in rem*.

There was, in fact, no attachment in existence to be dissolved at the death of the defendant Dipascuale. Nor is it true, if there was a subsisting attachment, that the death of the defendant abates or dissolves it. In *Mitchell v. Schoonover*, decided at the present term of this court, it was held that the death of a defendant after the levy of an attachment does not vacate or dissolve it. So that in any view the objection is untenable. Another objection urged is, that the undertaking is not such as is required by statute, and that the court erred in holding it sufficient as a common-law obligation, on the ground that a bond is a writing under seal, and that an undertaking being only a promise to pay the debt of another, and not under seal, no consideration can be presumed; but the same must be expressed in the writing. But in the case at bar there is a good and valid consideration expressed in the undertaking, and the matter of the seal is of little significance.

A bond or undertaking, as either may be prescribed by statute, to be given to secure the release of property attached, are designed to serve the same purpose and to stand upon the same consideration, and when an action is brought upon either, are governed by like principles. If a creditor voluntarily consents to dissolve an attachment levied upon the goods of his debtor, and relinquishes his lien at the request of any one, the promise of such person to pay the debt thus secured is made upon a valid consideration. The surrender of the lien being a detriment to the creditor is a sufficient consideration for the promise; but to enforce such promise or engagement, it is indispensable that it be in writing. When the defendant by his undertaking in writing promised and agreed to pay the amount of any judgment which the plaintiffs might recover against the defendant in that action, such undertaking was founded upon a valid legal consideration which the defendant Dipascuale received by the return to him of the property attached, and was good as a common-law obligation.

In *Central Mills Co. v. Stewart*, 133 Mass. 462, where the bond given was not such as the statute required, but being given and the property released, the court said: "But the

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creditor may voluntarily consent to dissolve an attachment by which he has sought to secure his debt, and if he does so at the request of any one, a promise by such person to pay the debt sought to be secured, either before or after judgment, is made upon a valid legal consideration. The bond by which the defendant agreed to pay the amount of any judgment which the plaintiffs might recover, etc., was therefore made upon sufficient consideration, which the defendant received by the surrender of the property attached, and was good at common law." Now, in the case at bar, the undertaking was duly executed by the defendant and accepted by the plaintiffs, and by their order the attachment was thereupon dissolved, and the property surrendered to its owner. The object of the undertaking, and its purport, is too plain to admit of controversy.

There is no question but what it is founded upon a valid legal consideration, is violative of no statute, and contains no illegal provisions. Why, then, is it not a good common-law obligation. The principle is familiar, that bonds intended to be taken in compliance with statutes, although not done so, if entered into voluntarily and founded upon a valid consideration, and do not violate public policy or contravene any statute, will be enforced by common-law remedies. (*Palmer v. Vance*, 13 Cal. 553; *Hunter v. Reese*, 61 Ala. 395; *Wade on Attachment*, § 187; *Kelly v. McCormick*, 28 N. Y. 322, 323.) A bond or undertaking given to obtain the release of property seized upon attachment is not rendered invalid by irregularity in making such attachment. By means of it, the property was released and surrendered, and the plaintiffs consented to dissolve the attachment, and the defendant in this action cannot defeat his liability because of some irregularity in such proceeding. The undertaking served its purpose to secure the release of the property attached, and the defendant is estopped now from setting up such irregularities. (*Carleton v. Dixon*, 12 Or. 148; *Coleman v. Bean*, 14 Abb. Pr. 38.) This result necessarily obviates the objections in respect to the attachment proceedings, and dispenses with the necessity of any further examination of them. Nor is it essential that the complaint set out the facts which

Points decided.

authorize the issuing of the attachment, and consequently there was no error in overruling the demurrer.

In regard to the objections raised as to the death of Dipascuale and his true name, and as to the appointment of the administrator, it is sufficient to say that we have examined the record and the argument in support of the objections, and are not satisfied that any prejudicial error is shown. It is to be borne in mind that in cases of this character, technical defenses are not favored, and the case does not stand as to objections, as it would between the parties to the original action.

It is objected, also, that the judgment is in excess of the amount named in the bond, and that such excess is error; but it is not in excess of such sum with interest from the breach, even though it be conceded that the liability under the undertaking is to pay "the amount of any judgment which may be recovered against the defendant in this action."

Upon the whole we think the judgment must be affirmed.

[Filed July 2, 1888.]

S. C. FLINT, ADMINISTRATOR OF THE PARTNERSHIP OF HUMPHREY AND FLINT, APPELLANT, v. R. PHIPPS ET AL., RESPONDENTS.

DEED—DELIVERY.—A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both.

DEED—POSSESSION OF GRANTEE—PRESUMPTION—BURDEN OF PROOF.—A deed properly executed in the possession of the grantee is presumed to have been delivered to him. He who disputes this presumption has the burden of proof, and must show that such deed was never delivered.

PROMISSORY NOTE—CONSIDERATION—BURDEN OF PROOF.—A promissory note imports a consideration. Whoever alleges that a promissory note is without consideration has the burden of proof.

APPEAL from Douglas County.

James F. Watson, and *J. C. Fullerton*, for Appellant.

W. B. Willis, and *J. W. Hamilton*, for Respondents.

16	437
98	819
19*	548
38*	190
16	437
29	43
29	521
16	437
33	437
16	437
37	443
16	437
48	223

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STRAHAN, J. — This is a suit to foreclose a mortgage executed by the defendant R. Phipps, to secure the payment of a promissory note payable to Humphrey and Flint for \$13,045, dated September 23, 1886, and signed by W. F. Owens and R. Phipps, due thirty days after date.

The defendant's answer admits that Owens and Phipps signed the note, but deny that it was delivered, or that it was executed for value, or any consideration. The answer then alleges that the consideration for signing said note was the taking up and delivery to Owens and Phipps of a certain note given by Owens and Phipps, N. Cornutt, and H. Weaver to S. Hamilton, for twelve thousand dollars, dated January 29, 1884, upon which there was then due and payable the sum of eight thousand dollars, and also to loan said Owens and Phipps five thousand dollars in money; that they did not take up said note, nor did they loan Owens and Phipps five thousand dollars, or any sum; that there was no other consideration for said note. The answer admits that Phipps signed and acknowledged the mortgage, but denies that either it or the note described therein was delivered; that as soon as the defendant Phipps discovered that the plaintiffs had not taken up the Hamilton note, and did not have the same to deliver to him, he refused to deliver said note and mortgage to the plaintiffs; that W. S. Humphrey, one of the plaintiffs, unlawfully, wrongfully, and without the consent of the defendant Phipps, took and carried away said note and mortgage from the table on which they were then lying, and delivered said mortgage to the county clerk, and procured the same to be recorded on pages 596, 597, and 598, volume 7, record of mortgages of Douglas County, Oregon. Deny that said mortgage was duly delivered on the twenty-third day of September, 1886, or at any other time, or that the sum of money therein specified, or any part thereof, is now due or owing to the plaintiffs. Deny that thirteen hundred dollars, or any part thereof, more than two hundred and fifty dollars, is a reasonable attorney's fee for foreclosing said mortgage. The reply denies the new matter in the answer. The cause was referred and the testimony taken in writing, after which the Circuit Court took the case under advisement.

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On the 9th of November, 1887, the learned circuit judge filed an able opinion, holding in effect that there was no consideration for the note and mortgage, and that they were never delivered. This opinion was accompanied by findings of fact and conclusions of law in harmony therewith, and was followed by a decree dismissing the suit, from which this appeal is taken. Upon the argument here, two questions have been presented. (1) Were the note and mortgage sued on delivered? (2) Were they executed upon a sufficient consideration? These questions I will now proceed to examine in their order.

1. The question of delivery is purely a question of fact. It is conceded that no particular form of words are necessary to constitute a delivery. "It is not necessary," said Lord, C. J., in *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281, "there should be an actual handing over the instrument to constitute a delivery. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both. (Shep. Touchstone, 57.) 'But by one or both of these,' Spencer, J. said 'it must be made.'" (*Jackson v. Phipps*, 12 Johns. 421; *Byers v. McClanahan*, 6 Gill & J. 256; *Stewart v. Redditt*, 33 Md. 67.)

W. S. Humphrey, since deceased, was one of the plaintiffs, and was called as a witness and testified in substance: "That at the time the note and mortgage sued on were given, W. F. Owens, Robert Phipps, Hans Weaver, and others, were indebted to the plaintiffs in the sum of \$19,045, for money advanced on certain bonds given by them; that he and Phipps talked the matter over while the mortgage was being drawn up, and Phipps said he would give witness a mortgage on his land. He said he knew we boys were entitled to our money and he would give us a mortgage, but he did not know whether his wife would sign it or not. He said his wife had said she would not sign any mortgage, but that we could go out and see her about it; but before the note and mortgage were concluded said that he did not think it was worth while for us to go out to see her about it, but that he would go ahead and give us the mortgage. He said he knew we were entitled to our money and he would

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give us a mortgage to secure us. He further said, 'you boys are entitled to your money and you shall not lose a cent, and I will give you a mortgage on my land to secure you.' He said he had no idea Owens had drawn so much on the bond given by him, Owens, and others, but they would have to pay it. Mr. Phipps signed the mortgage and delivered it to us to secure the above amount mentioned, on the twenty-third day of September, 1886. The note secured by the mortgage was delivered at that time. Mr. Phipps sat at the further end of the table and signed and acknowledged the execution, and it was passed up the table, and I don't think he said a word about it or objected to the delivery. He himself could not have handed it to me on account of his sitting at the further end of the table from me. I heard no objection from any one. I don't think I heard any words spoken consenting to the delivery of the note and mortgage. I did not hear Mr. Phipps ask Mr. Fullerton whether or not the Hamilton note was included in the mortgage. Did not hear Phipps ask Fullerton anything about it. Mr. Fullerton read the mortgage after it was prepared, to all present; nor did I hear any one ask Mr. Fullerton that question, or any one else. I did not hear Mr. Phipps ask Mr. Fullerton or any one else that question. Mr. Phipps did agree to give the mortgage without the Hamilton note in it. He agreed as we walked up the street together to give us a mortgage, but he said he did not know whether his wife would sign the mortgage or not, as she said she would not sign a mortgage for any one. But he would go to see her about it if we desired, but said he would sign it himself."

Mr. J. C. Fullerton gives the following account of the execution and delivery of the note and mortgage in controversy: "In the evening of September 23, 1886, I was sent for to come over to town and prepare, or assist in preparing, a mortgage which Mr. Phipps was to give to secure a debt he, Owens, and others, owed the bank. I came over, and Mr. Phipps came into town shortly afterwards. I went down to Lane's office, and at the request of some of the parties I went to the clerk's office to secure the description of Mr. Phipps' land, Mr. Flint accompanying me. We procured the description from the record the

best we could, and returned to Mr. Lane's office, where at my request Mr. Lane wrote the mortgage. Mr. Flint read the description of the land from the notes he had taken. After the mortgage was prepared the whole party went into the back room. I read the mortgage to the parties, or to all present, except a part of the description. The note was signed by Owens and Phipps, and passed up to me, and by me handed to Mr. Humphrey. Mr. Phipps then signed the mortgage. I signed it as a witness. Colonel Lane took the acknowledgment; I also signed it as a witness. It was then slid up the table, passing through Mr. L. F. Lane's hands to where I was sitting, and by me taken and laid on the corner of the table for Mr. Humphrey, who was standing at my shoulder. After the mortgage had been passed to me, and while we were all in the room, Mr. L. F. Lane expressed a doubt as to whether Mr. Phipps could claim contribution from his co-obligors on the bond to Humphrey and Flint, if he paid this mortgage. This matter was discussed for a minute or two, and we all, at least I went out into the front room, and the others came out and we started home, Mr. Humphrey and I in company. We stopped a moment by Ball's office. Mr. Phipps and Mr. Flint joined us, and I don't remember whether any one else or not. My impression is that they all left the office as we did. While standing there Mr. Phipps said, addressing Humphrey and Flint who were both there: 'Boys, if you won't put that mortgage on record I will raise the money to-morrow, or in a few days,' or words to that effect. Mr. Phipps did not in my hearing express any dissatisfaction with the mortgage, nor did he make any objection to its delivery as far as I know. The only thing that Mr. Phipps said about it that I remember of is what he said on the corner after we came out of the office, when he told Humphrey and Flint not to put it on record, as he would pay it in a day or two."

On his cross-examination this witness, referring to the execution and delivery of the mortgage, said in substance: "The mortgage after it was signed and acknowledged was slid along the table from where Colonel Lane, who took the acknowledgment,

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was standing, to Mr. L. F. Lane, who was sitting at the middle of the table; he held it a moment, I think, folded it or partly folded it; he then passed it along up to me. I was sitting at the other corner of the table. I took it and folded it, and laid it on the corner of the table. I think Mr. Humphrey picked it up as soon as I laid it down. The table was a small one. Colonel Lane slid it, or handed it to L. F. Lane; he held it a moment and laid it on the table, or pushed it along toward me. I picked it up. I would not be certain whether L. F. Lane indorsed this mortgage or not. I think he did. I know it was either not folded, or folded so loosely that I took it in my hand and folded it, or pressed down the folds. I am not positive whether Mr. Lane indorsed the mortgage or not; I believe that he did. Mr. Phipps did not tell Mr. Humphrey or me in so many words to take the mortgage, but acknowledged the execution of it freely and voluntarily but a moment before it was taken up by me."

Mr. W. S. Humphrey was recalled, and testified further as to the delivery of the note and mortgage in substance: "When Mr. Fullerton and Mr. Lane had prepared the mortgage, Mr. Fullerton read the mortgage to Mr. Phipps and all present, with the exception of the description, which was a long one, and the note mentioned was signed by Mr. Owens and Mr. Phipps previously to this time. It was then inserted or copied in the mortgage, and passed to Mr. Phipps to be signed by him. After he had signed it, Mr. Fullerton and Colonel Lane witnessed it, and it was then passed or taken by Colonel Lane, and the acknowledgment was taken by him. He passed it La Fayette Lane, who indorsed it and passed it upon the table to our attorney, Mr. Fullerton. Mr. Fullerton examined it and passed it to me. I looked over it to see that it was filled out in all its parts, and put it in my pocket, where I already had the note. We stopped there a few minutes, and La Fayette Lane, I think, spoke up, not to any one in particular, but in a general way, and said that he was not altogether satisfied as to whether Mr. Phipps could get contribution from the rest of the bondsmen. In my opinion Mr. Fullerton remarked, he will have no trouble about that. I

think he added that it is a general established rule of law that when one pays the debt or obligation of a joint obligor he is entitled to contribution. I think in substance that is about the language used. Mr. Phipps in my presence or hearing did not object to the delivery of the note and mortgage to me. Had he objected I should have returned them to him, and went on and issued an attachment to secure our claim. Mr. Phipps made no objection to this mortgage after it was signed and executed on account of Hamilton's claim not being in. Neither Mr. Phipps nor any one else forbade our taking the mortgage and putting it on record."

S. C. Flint gives substantially this account of the transaction: "The mortgage was drawn up by Lane, and while he was drawing it up Fullerton and I got the description of the land at the clerk's office, and I read the description to Lane, and he copied it in the mortgage. Fullerton then read the mortgage over, Phipps signed it, and Colonel Lane took the acknowledgment, and then handed the mortgage, I think, to Fullerton, who folded it once and either laid it on the table or passed it over towards Humphrey, I would not be certain which; that is as near as I can remember now. Mr. Phipps made no objection to Humphrey taking the mortgage, and said nothing that I heard. He was standing right near the table in the back room of Lane's office at the time. I heard Phipps say when he was out of doors near the corner, not to put the mortgage on record, and he would raise the money in a few days and pay it off. He also told me the same thing later in the evening just before I went home. He said don't put the mortgage on record, and he would raise the money in a few days; those are the words he used, as near as I can remember."

R. Phipps, the mortgagor, in substance gives this account of the execution of the note and mortgage: "Mr. Owens sent out to my house the twenty-third, I believe, evening of September last for me to come to town. I came to town. I found out when I came to town a United States deputy marshal was here to attach property for amount of five thousand dollars that Owens should have *owed* a company of the name of Hall, I think,

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claiming they had me and others as security. I says to Owens: 'What in the devil, or what in hell, does this mean?' Says he: 'It is an unjust debt against you, and you will never have to pay it.' He tried to raise the five thousand dollars and couldn't. I told him I would mortgage my land to help him out if any one would let me have the money. I wouldn't give a mortgage over the Hamilton debt. I and others had went his security for twelve thousand dollars. If any person would let him have the money and take the Hamilton note that would make about thirteen thousand dollars. He had paid about five thousand dollars, which had left a balance of eight thousand dollars, and the five thousand dollars would make thirteen thousand dollars. They went up to Hamilton's, I think Humphrey and Flem Owens. I don't know positive if Carey Fullerton went or not. They went up the second time I think; came back. Owens says to me that Humphrey and Flint would consume (assume?) the Hamilton debt and let him have the five thousand dollars. They went in the back room in La Fayette and John Lane's office, I suppose to draw up this mortgage. I sat down by the stove in the front room. Humphrey came out and asked me to take a walk. I objected, and he asked me the second time. I formed an idea that he was going around to the saloon to get a drink; but he didn't. We went out and walked down to the corner and turned to the left, and came up past Joe Sheridan's store, and around the block to the office and went in. Going up the street talking about Owens being behind with foreign companies I spoke, and says I: 'I don't see how in the devil that can be.' When I came into the office I sat down by the stove; other parties were in the back room; sometime they called me in and said that is ready, or the mortgage is ready. Carey Fullerton was sitting down in a chair at the table. He reads the mortgage, and stops and says, it's not necessary to read all of it. I signed the mortgage, got up and stood on the floor studying a little while, the way he read it Hamilton's name hain't been used in that mortgage; wheels around partly in his chair; 'is Hamilton's name to be in this mortgage?' I said, 'yes.' Says he, 'it will have to be another mortgage.' La Fayette spoke; said

something about releasing our co-obligators. The mortgage was lying on the table. Says I, 'that ain't what I intended; I won't give that kind'; I think it was that kind of a mortgage. Humphrey picked up the mortgage and started out on the street; a few minutes Carey Fullerton followed him. Flint, I couldn't be positive whether he went out with Carey or not. In a few moments I started out to look for them. As I came out of the light into the dark, it made the dark appear darker than it would be. I stepped down to the corner; I heard two persons step off; I took it, in fact I am satisfied it was Carey Fullerton. I says, 'don't put that on record.' There was no reply. I walked up to the office; set down. Sometime afterwards Flint came in. Mr. Flint said he would not put that on record until there was more satisfaction."

L. F. Lane, who drew the mortgage, and one of the defendants' witnesses, said in answer to question ten: "As I stated before, he (Phipps) said nothing specifically for what he gave the mortgage. From what Mr. Humphrey said in his presence I inferred it was to secure the bank. He several times stated he (Phipps) would raise that five thousand dollars and pay off that claim next morning. Mr. Phipps did most of his talking after I called his attention to the effect of the mortgage."

1. This is the material evidence on each side in relation to the execution and delivery of the note and mortgage. There are other facts referred to by the witnesses which affect the question more remotely, but the evidence above collated presents the account given on each side as to what occurred at the time, and from this evidence mainly we must determine whether or not said note and mortgage were in fact executed and delivered. On the question of the delivery, the note seems to have been lost sight of by the defense entirely. Their evidence relates altogether to the delivery of the mortgage; but I suppose they both rest upon the same facts, and that they ought to be so regarded by the court. Before proceeding to a further consideration of the facts, I think the circumstances under which it is alleged these papers were executed ought to be adverted to. On the evening of the day of their alleged execution, a deputy United States

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marshal appeared in the city of Roseburg with an attachment issued out of the United States Circuit Court for the district of Oregon in favor of *Hall & Co. v. W. F. Owens, R. Phipps & al.* for five thousand dollars. In some way, how does not appear, nor is it material, Owens learned the facts and so did Humphrey and Flint. Owens sent into the country for Phipps to come to town, and he arrived there late in the evening, and the note and mortgage were signed between eleven and twelve o'clock that night. Under these circumstances it was natural for Humphrey and Flint to desire security for their debt, and all of their movements were directed to that end. Phipps now claims he was not liable to them for anything; but that will be considered further on. The defendant Phipps' liability to Dr. Hamilton is beyond question, and he was anxious to secure him. His liability to Hamilton was as security for Owens, and not otherwise, and if he was liable to Humphrey and Flint for any sum, it was as security for Owens and not on his own account. If Phipps was liable to Humphrey and Flint at all, no reason is perceived why he should not have had the same interest in securing them that he did Dr. Hamilton. He probably would have been governed by the same motive in the one case as in the other; at least, so far as we can discover from this evidence there was no difference.

The motive assigned by one of the plaintiffs is a desire or willingness on the part of Phipps in the presence of impending financial disaster to secure those whom they call "home creditors." On the other hand, the motive assigned on the part of the defendant Phipps was to secure Dr. Hamilton, make him a preferred creditor, and to obtain from Humphrey and Flint a further loan of five thousand dollars to pay off Hall & Co. Between these conflicting motives and purposes, we are compelled to decide from the evidence in this record. Whatever may have been the motive of Phipps, it seems to us highly improbable that Humphrey and Flint would, in the face of threatened bankruptcy of Owens and Phipps, without any benefit to themselves whatever, make a further loan of five thousand dollars to Owens and Phipps, and assume Hamilton's debt of eight thou-

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sand dollars, and stay up till the hour of midnight hunting for such an investment. Such a suggestion, to say the least of it, seems highly improbable. Before proceeding further with an examination of the evidence on the question of delivery, it may be proper to advert to the legal presumption which arises in all cases where a deed properly executed and acknowledged is found in the possession of the grantee. In such case it will be presumed that such deed was delivered by the grantor and accepted by the grantee, in the absence of proof to the contrary. (*Wolverton v. Collins*, 34 Iowa, 238; *Adams v. Frye*, 3 Met. 103; *Chandler v. Temple*, 4 Cush. 285; *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75; *Games v. Stiles*, 14 Peters, 322; *Jaques v. Trustees of the M. E. Church*, 17 Johns. 548; *Souwerbye v. Arden*, 1 Johns. Ch. 240; 3 Washburn on Real Property [5th ed.], p. 312, § 31.)

The learned author of Devlin on Deeds, volume 1, section 294, states the rule thus: "The possession of a deed duly executed in the hands of the grantee is *prima facie*, but not conclusive evidence of its delivery. It therefore follows that he who disputes this presumption has the burden of proof, and must show that there has been no delivery."

It being undisputed that the mortgage was executed with all the formalities required by law, and that the same is in the possession of the mortgagees named therein, makes a *prima facie* case for them. They need no other proof in the first instance. It devolves on the defendants to rebut this presumption, and to accomplish that, they must have a preponderance of evidence in their favor on that issue. Laying this presumption entirely out of the case, it seems to me that the evidence preponderates in favor of the delivery of the mortgage. There are a greater number of witnesses in favor of the plaintiffs. They had the same opportunity of knowing the facts; to say the least, they are of equal intelligence. There is nothing in the character of their evidence to cast doubt or suspicion upon it, and the delivery of the deed follows as the usual consequence of its signing and acknowledgment; in other words, it is the legal completion of the acts in which the parties were then engaged.

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The evidence offered by the defendants must meet and overcome these facts and circumstances which weigh in favor of the plaintiffs, and they must be of such a nature and character as to enable the court to declare that the weight or preponderance of the evidence is with the defendants on the question of delivery. The defendants' evidence fails to do this; but when the presumption which the law declares from the undisputed facts is allowed to have any force or effect, it must be apparent that the court could not do otherwise than find that the note and mortgage sued on were delivered.

2. Equally untenable is the defendants' claim that the note declared upon it is without consideration. A promissory note imports a consideration. Whoever alleges the contrary has the burden of proof. (2 Greenleaf on Evidence, § 172; Story on Promissory Notes, § 7; *Lines v. Smith*, 4 Fla. 47; *Burnham v. Allen*, 1 Gray, 496; *Decon v. Carruth*, 108 Mass. 242; 1 Parsons on Bills and Notes, p. 193; 1 Daniel on Negotiable Instruments, § 163.) But it is useless to multiply authorities on this question; they are all to the same effect. A very careful review of the evidence satisfies us that there was a sufficient and adequate consideration for the note, and that consideration was Owens' indebtedness to the plaintiffs. It is true the plaintiffs are not required to prove in the first instance there was any consideration for the note. They may content themselves with meeting such affirmative evidence as the defendants may offer tending to impeach the consideration.

The allegation of the answer is that the note was signed in consideration of said plaintiffs taking up and delivering to Phipps and Owens the Hamilton note, upon which eight thousand dollars was due, and the loaning to Phipps and Owens of five thousand dollars, and that plaintiffs did neither. But the learned circuit judge seems to have tried the case on the theory that the plaintiffs were bound to prove the consideration for the note, and inasmuch as their testimony tended to prove that Phipps was liable to plaintiffs on a bond given by Owens, with Phipps and others as sureties, if he reached the conclusion which he did, that the plaintiffs had failed to prove that Phipps signed

such bond, that then in such case there was no consideration for the note. If it were necessary to a proper determination of this case, we would feel constrained to reach a different conclusion on that question. In many parts of this testimony, Phipps impliedly admits his liability on that bond, and he scarcely seems willing to deny it in any form only when driven to it by the direct question of his counsel. And when Lane spoke of the right of contribution amongst the parties to that bond at the time and after the note and mortgage were signed, Phipps did not pretend that he had not signed the bond. On the contrary, it was Lane's suggestion if he paid this note he might not be able to enforce contribution from the other parties to it that made him hesitate. But it is not necessary to examine this evidence in detail. Its whole tenor satisfies us that Phipps did sign that bond. But if it were otherwise, Owens' liability to the plaintiffs is beyond question. His debt would be a sufficient consideration to sustain the note, so that if Phipps either executed the note to secure the debt of Owens, or the liability of himself and Owens on the bond, the note would have a sufficient consideration to support it. But in any event the plaintiffs are entitled to recover on the note, unless the defendants have proven by a preponderance of the evidence that the only consideration therefor was that set up in their answer. No other inquiry as to the consideration of the note is presented by the pleadings.

The decree of the court below must therefore be reversed, and a decree entered here foreclosing said mortgage.

Points decided.

[Filed July 2, 1888.]

JOHAN PAULSON ET AL., RESPONDENTS, v. CITY OF
PORTLAND ET AL., APPELLANTS.

SEWERS—COLLECTION OF ASSESSMENTS.—Where the common council of the city of Portland, by ordinances duly adopted, caused a certain sewer in the north part of the city known as Tanner Creek Sewer to be constructed at a cost of over thirty-five thousand dollars, which it directed to be assessed on property it declared to be directly benefited thereby under the authority contained in section 121 of the city charter, *providing*, "that the common council of the city shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such sewer or drain, and to estimate the proportionate share of cost thereof to be assessed to the several owners so benefited." *Held*, in a suit brought by a number of the owners of the property to enjoin the collection of the assessments, upon the grounds of the charter not requiring notice of the proposed construction of such works to be given, and of the assessment having been arbitrarily levied, without regard to the value of the benefits conferred by the improvement, that such owners were properly united as plaintiffs in the suit, if such ordinances were void. That although the interests of such owners were distinct, that they differed in extent, and were not similarly affected, yet the cause being common to them all, and each having the same character of remedy, they had a sufficient community of interest to entitle them to join as such plaintiffs. *Held*, however, following the decision of this court in *Strawbridge v. City of Portland*, 8 Or. 67, which the court under the particular circumstances of this case regards itself as bound to do, that the failure of the charter to require such notice to be given does not render section 121 void; nor do the proceedings had under it have the effect to deprive such owners of their property "without due process of law." *Held*, that where a question has been decided by this court, and parties, relying upon the decision as a settled rule of law, have transacted important affairs which would be seriously affected by a change of the rule, the court will adhere to it in subsequent cases, however it might be inclined to hold if the question were *res integra*. *Held*, that the assessment of a proportionate share of the cost of a local improvement by the officers of a municipal corporation, upon parties specially benefited thereby, cannot be made in excess of the value of the benefit conferred; but where the improvement directly benefits the property of such parties, the question of the extent of the value thereof must be determined by the proper officers of the corporation. The courts will not interfere in such a case, unless the property assessed is so situated as to render it physically impossible for the improvement to benefit it; or where the mode of levying the assessment excludes the consideration of the question of value of the improvements. *Held*, that as said section 121 of the city charter of the city of Portland only empowers the common council of the city to lay down necessary sewers and drains, it is a limitation upon the power of the council to establish the same, unless the benefits to the property accommodated thereby will be equal to or in excess of the cost of their construction. *Held*, that where an assessment is levied upon property for a share of the cost of a local improvement, which is so situated that it cannot possibly be benefited thereby, the owner of the property may maintain a suit to prevent the enforcement of the assessment; but that different owners of distinct parcels of property so assessed have no right to join as plaintiffs in such suit.

16	450
24	165
24	508
19*	450
33*	541
34*	11

16	450
25	112
25	228
19*	450
35*	27
35*	453
16	450
38	393

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APPEAL from a decree of the Circuit Court for the county of Multnomah.

Williams & Wood, and *L. B. Linthicum*, for Respondents.

W. H. Adams, and *Mitchell, McDougall, Tanner & Bower*, for Appellants.

THAYER, J.—The respondents, consisting of about two hundred persons, brought a suit in said Circuit Court to enjoin the collection of an assessment for the construction of a sewer in the north part of the city of Portland, known as Tanner Creek Sewer. The common council of said city, on the fifth day of March, 1887, passed an ordinance known as ordinance No. 5088, providing for the construction of the said sewer. The termini and course the sewer was to be laid were specified in the ordinance; the territorial district to be drained and sewered was defined therein, and the lots and blocks within such district which were declared to be benefited and subject to assessment on account of such sewer were named.

The said ordinance also contained the following provisions: "That R. L. Durham, Charles G. Schramm, and H. W. Monnastes, disinterested persons, be, and they are hereby appointed, viewers to estimate the proportionate share of the cost of said sewer, to be assessed to the several owners of property benefited thereby, in accordance with the provisions of section 121 of the charter of said city, and report the same to the common council within sixty days from the date of the approval of this ordinance by the mayor. Said viewers shall hold stated meetings in the office of the auditor and clerk of said city, and all persons interested may appear before said viewers, and be heard in the matter of making said estimate."

The said viewers, in pursuance of the said provision contained in said ordinance, made and filed their report on the third day of July, 1887, and the said common council thereupon passed an ordinance known as ordinance No. 6162, approved August 19, 1887, by which they adopted the said report of the viewers, and directed the auditor and clerk to enter a statement of said

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assessments in the docket of city liens, and that on the twenty-second day of November, 1887, warrants were issued for the collection thereof, in pursuance of which the chief of police of said city was, at the time of the commencement of the suit, attempting to collect said assessments. The respondents, who are owners in severalty of certain lots and parcels of land within said district which are respectively charged with a portion of said assessments, seek to have the statement entered in the docket of city liens set aside and canceled, and the proceedings to enforce the assessments perpetually enjoined.

The grounds upon which they claim such relief, as shown by their complaint filed in the suit, are, that said section 121 of the charter of said city of Portland, under which the said viewers were required to estimate the proportionate share of the cost of said sewer, to be assessed to the several owners of the property benefited thereby, is unconstitutional and void; that said ordinance No. 5068 is unconstitutional and void; and that the property assessed was not directly benefited by said sewer.

Said section 121 of the city charter provides "that the council shall have the power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer; but that the mode of apportioning estimated costs of improvement of streets, prescribed in sections 112 and 113 of the charter, shall not apply to the construction of such sewers and drains; and that when the council shall direct the same to be assessed on the property directly benefited, such expense shall, in every other respect, be assessed in the same manner as is provided in the case of street improvements; *provided*, that the council may, at its discretion, appoint three disinterested persons to estimate the proportionate share of the cost of such sewer or drain, to be assessed to the several owners of the property benefited thereby, and in the construction of any sewer or drain, the city shall have the right to use and divert from their natural course any and all creeks or streams running through the city into such sewer or drain."

Neither said section 121, nor any other section or clause of the city charter, requires any notice to be given to the owner of

lots or blocks assessed, with a share of the cost of such sewer or drain of the proposed construction thereof. The common council is empowered to lay down such sewers and drains, and assess the cost thereof on the property directly benefited thereby upon its own motion. It is upon this ground that the respondents claim the said ordinances to be unconstitutional, which is the main question in the case.

The appellants interposed a demurrer to the respondents' complaint upon the grounds: (1) That there was a misjoinder of parties plaintiff, in that, to wit, there were numerous persons, owning separate and distinct parcels of land not similarly situated, nor similarly affected by the matter alleged in the complaint, and not having any unity of interest in the subject of the suit or the relief demanded, joined as plaintiffs. (2) That there was a defect of parties in that, to wit, there was no such unity of interest among the said plaintiffs in the subject of the suit, or the relief demanded therein, as entitled them to be so joined. (3) That said complaint did not state facts sufficient to constitute a cause of suit. The Circuit Court overruled the demurrer, and the appellants failing to answer over granted a decree for the relief prayed in the complaint. The demurrer to the complaint for misjoinder of plaintiffs and defect of parties did not specify the proper grounds of objection. Misjoinder of parties is no ground of objection by demurrer, and it did not appear from the face of the complaint that there was a defect of parties.

The objection which the appellants' counsel aimed to raise was, that several causes of suit had been improperly united. But I do not think a demurrer would lie upon that ground if the ordinance levying the assessment was void. The plaintiffs' interests were, it is true, distinct and differed in extent, and very likely were not similarly affected; but the cause was common to them all, and their respective remedies for redress or prevention were the same. The case would be analogous to that of a nuisance affecting several owners of real property, where it is a common injury to them all, and they each have the same character of remedy to abate it. I think that in all cases where parties are threatened with injury from one wrong, they have a

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sufficient community of interest to entitle them to unite as plaintiffs in a suit to prevent it, although their interests are distinct and affected to a different extent. Such a rule should be maintained in order to prevent a multiplicity of suits, and is now, as shown by the authorities cited by the respondents' counsel, well established.

The respondents' counsel contend that said ordinances and proceedings had thereon are unconstitutional, for the reason that the plaintiffs in the suit are arbitrarily declared benefited, without any notice or opportunity to them to be heard on that point, or as to the amount of the assessment; and that the effect thereof is to deprive them of their property without *due process of law*, which the counsel insist is contrary to the fourteenth amendment of the Constitution of the United States. Said amendment since its adoption has been so often referred to by counsel in support of personal and property rights, and been given such prominence by courts in adjudicating upon them, as to leave the inference that it was a *bran new* principle in the law. The bar and bench seem to have forgotten that it was a part of ancient English liberties, confirmed by Magna Charta on the nineteenth day of June, 1215, which came to the people of the United States as a part of the common law. Chapter 29 of Magna Charta declares that "no free man shall be taken or imprisoned, disseised from his freehold or liberties or immunities, nor outlawed, nor exiled, nor in any manner destroyed, nor will we come upon him or send against him, except by legal judgment of his peers, or the law of the land."

This provision has been a fundamental rule in the judicial system of every State in the Union which has adopted the common law; and to deprive a person of his property except by "due process of law," or "by the law of the land," which means the same thing, would be illegal in the absence of the said fourteenth amendment. The people have never delegated any such authority to either the State or federal government. The amendment, therefore, introduces no new principle into the administration of our municipal affairs; it is but declaratory of a rule which has existed beyond the memory of man, and our

judicature was builded upon it. The question has never been, either before or since the adoption of the said amendment, whether the party could be deprived of his property without due process of law; but it has always been, whether the act complained of came within that wholesome inhibition. The latter inquiry is the one with which we have to deal in this case; it is whether the construction of said Tanner Creek Sewer by the common council of the city of Portland, and charging the cost thereof upon the lots and blocks owned by the respondents and others, which are claimed to be benefited by the sewer, without first giving such owners notice of its proposed construction, is depriving them of their property "without due process of law."

The question is one upon which the authorities are not in harmony, though I am satisfied that they largely preponderate in favor of the respondents' side of it; at least, the cases which hold that notice to a party in some form must be given before his property can be charged with a burden in order that he may have an opportunity to contest the right to impose it, or question the expediency of exercising it, is more in consonance with my idea of justice. And the very able opinion of Mr. Justice Earl, in *Stuart v. Palmer*, 74 N. Y. 191; 30 Am. Rep. 289, furnishes cogent and convincing logic that a proceeding of the nature and character referred to would operate to deprive the party of property "without due process of law"; but we cannot conclude that a proceeding under a legislative enactment, authorizing a burden to be imposed upon property without requiring notice to be given to the owner, would necessarily have the effect mentioned, without overruling a former decision of this court.

In *Stroubridge v. City of Portland*, 8 Or. 67, the question of the necessity of notice in such cases was directly raised. It was claimed in the brief of the appellants' counsel, which was prepared by Mr. Dell, that notice was a fundamental act, the absence of which rendered the assessment void. The respondents' counsel, upon the contrary, insisted that while the common council had caused notice to be published, in which it was stated that certain property would be assessed, it was a matter purely *ex gratia*, and could not affect the cause; that the common

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council was under no obligation to give any notice or publish any resolution. Judge Boise, who delivered the opinion of the court at page 83 of the case, used the following language: "The elaborate manner pointed out in the charter for acquiring the authority to construct street improvements does not apply to the construction of sewers. The latter may be laid when, in the judgment of the city council, the same shall be necessary. They may be made without previous notice, the council alone being the judge of their necessity. Sewers are required as a part of the sanitary regulations of the city to prevent the development of local disorders, and generally to preserve the public health. It may, and often does happen in populous towns, that active measures have to be taken by city authorities in sanitary regulations, and it would not be wise to leave so important a power, often requiring the most prompt exercise to the tardy mode provided for inaugurating street improvements. Section 106 (now § 121) alone provides for the manner of making drains and sewers. The only question is, has the city council promptly exercised its powers under such section?" The view here expressed by the learned judge may not accord with that entertained by the present members of this court. In the light of subsequent decisions, we might be inclined to hold differently; but a court is not always at liberty to enforce the personal opinions of its members; due deference must be paid to the adjudications of their predecessors, more especially where a different course would interfere with property rights.

The decision in *Stowbridge v. City of Portland* was made nearly nine years ago. It declared valid the identical provision of the charter of the city which is before us, and under which all the sewers within the city have been constructed. Upon the faith of that decision, doubtless, the proceedings complained of were instituted, and an expenditure of thirty-five thousand dollars incurred in the construction of the said sewer; and to overrule it under the circumstances and pronounce void an act of the legislature under which the city, for more than a quarter of a century, has been carrying on extensive operations, would create confusion and occasion injustice. If the rule of *stare decisis* is

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applicable under any circumstances, I think it should certainly be applied in this case. It cannot, it seems to me, be consistently asked of us that we pronounce so important a provision of a city charter void, which this court by a solemn adjudication in a former case has held to be valid, whatever our holding might be if the question were *res integra*.

We had occasion under similar circumstances to apply the doctrine of *stare decisis* in the *City of Corvallis v. Stock*, 12 Or. 391. The question there was, whether an appeal to the Circuit Court for the county of Benton would lie from a judgment of the recorder's court of the city for the violation of a city ordinance. The Circuit Court, following *Sellers v. City of Corvallis*, 5 Or. 273, sustained the appeal. Upon an appeal to this court from that ruling, it was contended by the appellants' counsel that *Seller v. City of Corvallis* has been overruled in *Town of La Fayette v. Clark*, 9 Or. 225, in which it was held, that an appeal would not lie from the judgment of a recorder of a city for the violation of a city ordinance, unless the right was given by statute; and the court was of the opinion that there was no material difference between the La Fayette charter and the Corvallis charter upon that subject, and said that it would be inclined to hold that the latter charter did not provide for such appeal, if it were not for the decision in *Sellers v. City of Corvallis*. That decision, we said, was rendered by judges occupying the same position we occupy, and while we did not indorse it, nor regard the reasons upon which it was predicated as satisfactory, yet that we did not feel at liberty to depart from it in the particular case before us.

It would be better, no doubt, if all judicial decisions were made upon correct logical principles; but that cannot be while intellectual infirmity exists; and experience has shown that it is less injurious to endure the evils of an unsound precedent, than to change it when the result would cause confusion, and disappoint and damage parties who have relied upon it as an established rule of law. Upon the principle here indicated we feel constrained to adhere to the ruling, as regards the question of notice made in *Stowbridge v. City of Portland*, *supra*. The

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respondents' counsel also objects to the said ordinances, upon the ground that they do not provide for the levying of the assessments upon the property directly benefited in accordance with the rule of law, which requires assessments for local improvements to be laid in proportion to the special benefit received, over and above that general benefit experienced by the whole community.

The common council of the city, in section 5 of said ordinance No. 5068, declared that all the lots and blocks, and parts of lots and blocks, within the district before referred to would be directly benefited by said sewer, and were subject to assessment therefor, in proportion to the benefits received thereby as provided in section 121 of the city charter of said city. The subsequent ordinance, No. 5162, was adopted, and the proceedings thereon had, in order to estimate the proportionate share of the cost of such sewer to be assessed to the several owners of the property benefited thereby, and to assess the same to such owners. This subsequent ordinance and proceedings were evidently in pursuance of the prior ordinance, and were an exercise of the authority vested in the said common council by said section 121 of the city charter. Unless, therefore, the proceedings were in excess of the authority conferred by said section 121, or a fraudulent exercise of the use thereof, or the said section itself is void, said ordinances and proceedings cannot be attacked collaterally. The counsel's contention, if I understand it correctly, is that assessments for local improvements can be levied only to the extent of the special benefit conferred by such improvements, and that all exactions beyond that is taking private property for public use without just compensation. Said council do not claim that said section 121 of the charter is faulty in that particular, unless the meaning of it is that the property declared directly benefited shall bear the entire expense of the improvement, although in excess of the special benefit conferred. Their claim is, that declaring all the property within the sewer district directly benefited, and subject to assessment to the extent of the cost of its construction, without prescribing any mode of determining such benefit, was illegal.

The result of the counsel's theory is that a municipal corporation has no authority to make a local improvement, and charge the entire expense thereof upon the property benefited thereby, unless it specially benefits the property to the amount of such expense. That theory is no doubt correct. I do not think it can be successfully controverted; but who is to determine the question? Is it the board of directors of the corporation, or are the courts to determine it as a question of fact? If we were to say the latter, every case of local improvements would be liable to come into the courts, and there would be as many issues to determine as there were individual owners of property assessed; at least I never have heard of one being satisfied with his assessment in such a case. Again, how are the courts to determine such a question? Will they do it upon the testimony of witnesses called as experts, to give their opinions as to whether the benefits to a lot assessed for such purposes is equal to the amount assessed thereon, the same as in cases of taking property for streets and highways? Such a course would hardly be practical, and would only result in substituting in place of the judgment of the common council, who are selected on account of their supposed fitness for that duty, the opinions of a multitude of witnesses, many of whom would be personally interested in the controversy.

It may be said that as the Circuit Court, under the Constitution of this State, has jurisdiction and supervisory control over inferior courts, officers, and tribunals, it has power to prevent a municipal corporation from inflicting a wrong upon a citizen by levying an unjust assessment upon his property. This would doubtless be so where the officers of the corporation had usurped its functions, or were engaged in perpetrating a fraud; but on the other hand, if the courts were to undertake to control the discretion of the officers of a municipal government, it would be a usurpation on their part. The common council of the city of Portland is not required to prescribe a mode for determining the benefits to property accruing from local improvements. In the case of the construction of a sewer, it has authority to determine what property is directly benefited thereby, and to estimate the

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proportionate share of the cost of such sewer to be assessed to the several owners of the property thus benefited. It exercises such authority as agent of the State, and for the public good; and so long as it keeps within the scope of its power the courts have no control over it, nor jurisdiction in a collateral proceeding to question its acts. If it were to attempt to assess property for the cost of constructing a sewer, so laid as to render it physically impossible to benefit the property, as in the case of *Hanscom v. City of Omaha*, 11 Neb. 37, it would exceed its authority, and it would be the duty of the courts to interfere and prevent the wrong from working injury; but where the property is directly benefited by the prosecution of such an enterprise, and the common council has assessed what it deems a proportionate share of the cost upon the owner thereof, the courts are not authorized to institute an inquiry in order to ascertain whether or not the assessment exceeds the benefits. Such a practice would lead to interminable litigation.

The legislature has adopted the course prescribed in section 121 of the charter for laying down sewers. It has not provided any mode for estimating the value of the benefits conferred, whereby they may be compared with the amount of the assessments, for the reason, I suppose, that the former are presumed in all cases to exceed the latter; indeed, it would be very difficult to establish by proof the extent of the value of improvements of that character. Every one knows that a sewer in a densely populated part of a city is a necessity, and that the property there would be of no comparative value without it. The primary object of such an improvement is to confer a special benefit upon the property owner. The nature of this class of improvements is well described in *State v. City of Newark*, 3 Dutch. 185, in which the court, at pages 188 and 189, says: "There are in the legislation of every State a variety of statutes, whose primary design is the improvement of private property, and in which the public interest is merely incidental. To effectuate the object of these laws, they authorize assessments in the nature of taxes upon individual property, and direct the mode of enforcing them. Of this nature are many statutes,

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public and private, in relation to the reclaiming of drowned lands, and the draining and fencing of swamp and meadows. The immediate design of these acts is the improvement of private property, each individual interested being required to contribute to the expense in proportion to his interest in the property, and to the benefit supposed to be conferred upon him. The public are interested in this class of improvements only as they tend to improve the salubrity of particular districts, or to increase the general wealth of the community. These assessments have little analogy to public taxes, either in the purpose for which they are assessed, or in the mode of enforcing them. So a city ordinance requiring every lot-holder to drain the surface water from his lot, to avoid the creation of a nuisance affecting the public health, and in case of failure, directing it to be done at public expense, and the amount to be a lien on the respective lots, though the design be purely a public benefit, savors more of a mere police regulation than a measure of taxation."

I can discover no inherent defect in the charter in regard to the mode of assessment of the costs of sewers. The common council only has power under it to lay down *necessary* sewers, and I think this court has the right to presume that when a sewer is necessary, its benefits to the property which it is intended to accommodate will be in excess of the expense incurred in its construction. Nor was the ordinance establishing the sewer in question, and declaring that the property within the sewer district referred to would be directly benefited by the sewer, and providing for estimating the proportionate share of the cost thereof to be assessed to the several owners of the property, void, unless it be shown that in consequence of the location of the property it was impossible for it to receive any benefit therefrom. The respondents allege in their complaint that their property, or any part of the same, had not been benefited, and would not be benefited by the sewer. This allegation is a mere conclusion. Whether their property had not been benefited, or would not be benefited by the sewer, must be shown by facts alleged. They do allege in a subsequent part of their complaint

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that certain of their property within the said district assessed for the construction of the said sewer was at a level, so low that it was impracticable to drain the same into the sewer. That is a fact which if established by proof might entitle the owners of such property to relief against the assessment. Owners of property assessed a proportionate share of the cost of a sewer, who cannot, in consequence of its physical location, be benefited thereby, are entitled to relief against such assessment; but I do not think they have the right to join as plaintiffs in a suit to obtain the relief, as the assessment and attempted enforcement of it are the grounds of the complaint, and as respects each owner are several in their nature—are distinct acts.

Under this view the demurrer to the complaint should have been sustained. The decree appealed from will therefore be reversed, and the cause remanded to the Circuit Court, with directions to sustain the demurrer, and for such other proceedings as are consistent with the rules of law in such cases.

Petition for rehearing.

[Filed October 11, 1888.]

THAYER, C. J.—It has been held by courts of good standing that improvements, such as the construction of drains and sewers, might be made, and the cost thereof assessed upon the owners of adjacent property, without formal notice to them of the proposed improvement. The grounds upon which such decisions are maintainable, if at all, are, that the act is but the exercise of the taxing power of the State; and as the State, when it deems it necessary for the health and comfort of the community that such improvement be made, and the adjacent property will be benefited thereby, may directly cause it to be made without previous notice to the parties affected. It can delegate to a municipal corporation, as its agent, the same power, without requiring it to give such notice as a condition of the exercise of the power. Whether such view is strictly correct or not, we have not undertaken to determine.

This court, as shown in our opinion delivered herein, held, several years since, that such authority could be exercised with-

out previous notice, upon the faith of which important affairs have been transacted, creating rights and establishing relations that would be disturbed, to the great annoyance of the public, if that decision were overturned. In view of that fact, we feel bound to adhere to the previous ruling upon the question, whatever our views might be regarding it if *res nova*.

The petition for a rehearing must be denied.

STRAHAN, J.—I concurred in the affirmance of the decree in this case, and also in the order overruling the petition for a rehearing, on grounds somewhat at variance from those stated in the opinion, and which, I think, I ought to indicate briefly. The plaintiffs were not active nor prompt in complaining of those assessments. So far as appears, they remained passive and indifferent spectators during all the time the city was engaged in assuming liabilities in the construction of the sewer. Had they been prompt in complaining and in averting the action of the city, before the liabilities were incurred and the work substantially completed, it seems to me they would have occupied a more favorable light in a court of equity. I do not say that this apparent laches would close the door of a court of equity against them in a case free from doubt, but it requires the court to examine their claim somewhat more critically than it would otherwise be inclined to do.

The ordinances relating to this sewer were duly published in the official newspaper of the city of Portland. This of itself may not amount to technical notice to the plaintiffs of what the city was doing, and yet there is authority for holding that the members of a corporation are bound to take notice of its laws. (*Inhabitants of Palmyra v. Morton*, 25 Mo. 593.) But however this may be, it appears from appendix "A," annexed to the plaintiffs' amended complaint, that the viewers appointed by ordinance No. 5068 to estimate the proportionate share of the cost of said sewer, to be assessed to the several owners of property benefited, gave notice of their first stated meeting, which was on June 25, 1887, at 6:30 o'clock P. M. of said day, by publication in the *Daily News*, the official paper of the city, at

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which time they met and proceeded with their work, adjourning from day to day until the final completion of their labors. The object of this notice was to enable every person interested to be present and defend his rights before the viewers; to make such representations and statements before them as his interest might require or the facts justify, and if the law were improperly applied in any particular instance, the party injured had his remedy by writ of review to correct the same. (*People ex rel. Citizen's Gaslight Co. of the City of Brooklyn v. Board of Assessors of the City of Brooklyn*, 39 N. Y. 81; *Kennedy v. City of Troy*, 77 N. Y. 493; *Le Roy v. Mayor etc.* 20 Johns. 430; 11 Am. Dec. 289; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Western R. R. Co. v. Nolan et al. Board of Assessors of the City of Albany*, 48 N. Y. 513; *Rhea v. Umatilla Co.* 2 Or. 298; *Poppleton v. Yamhill Co.* 8 Or. 338; *Oregon & W. M. Savings Bank v. Jordan*, 16 Or. 113.) But it is objected that neither the charter nor ordinance expressly provides for notice, and that, therefore, though notice may have been in fact given, the constitutional objection of want of notice is not met.

Sections 95, 96, 97, 98, and 99 of the charter all provide for and regulate notice in case of improvement of streets; and section 121, which authorizes sewers, provides, among other things, "and when the council shall direct the same (costs) to be assessed on the property directly benefited, such expense shall in every other respect *be assessed* and collected in the *same manner as is provided in the case of street assessments.*" The charter expressly provides for notice in case of street assessments, and section 121 makes the provisions applicable in case of sewers, where the expense is ordered by the council to be made a charge on the property directly benefited. In addition to this, section 12 of ordinance No. 5068, provides that the viewers shall hold stated meetings at the office of the auditor and clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimates.

I think it would be a reasonable construction of this ordinance to hold that the right to be heard implies that notice shall be given, and if this be so, the ordinance does provide for notice by

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necessary implication. That which is implied in a statute is as much a part of it as what is expressed. (*Minard v. Douglas Co.* 9 Or. 206.)

This view of the subject, it seems to me, fully satisfies the constitutional requirements insisted upon by counsel for appellants. In *Hildreth v. City of Lowell*, 11 Gray, 345, the ordinance alone provided for notice, which was given, and this was held sufficient. And *Williams v. Mayor etc. of Detroit*, 2 Mich. 560, is to the same effect.

LORD, J., was for a rehearing.

[Filed July 2, 1888.]

CITY OF PORTLAND, APPELLANT, v. JAMES TERWILLIGER, RESPONDENT.

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DEED—CONSTRUCTION—NATURE OF ESTATE.—Defendant agreed to convey land to the plaintiff, and plaintiff agreed that one fourth of the land should be used as a cemetery, and to expend four hundred dollars in building a road to the same; that the proceeds of the sales of burial lots should be used in improving the grounds, and that one burial lot be conveyed to each of the grantors. A deed was executed pursuant to this agreement upon the "expressed terms, conditions, and reservations," and in consideration that plaintiff perform such stipulation; but no right of entry was reserved, nor was it provided that said estate should cease on non-performance. The grantee was put in possession. *Held*, that such deed conveyed an absolute estate.

SAME—BREACH OF CONDITION—CITY ORDINANCE.—Such stipulations are not violated by a city ordinance prohibiting the burial of the dead within the corporate limits of plaintiff, which was made operative over such cemetery by a legislative act enlarging the boundaries of the city so as to embrace the same.

APPEAL from Multnomah County.

W. H. Adams, R. & E. B. Williams, and A. H. Tanner, for Appellant.

Gearin & Gilbert, for Respondent.

STRAHAN, J.—This is an action of ejectment, commenced by the city of Portland to recover a tract of land within the corporate limits of said city, containing about five acres, and known

as the "Old City Cemetery." A trial in the Circuit Court resulted in a verdict and judgment for the defendant, from which the plaintiff has appealed. Numerous exceptions were taken upon the trial, and the same have been argued on this appeal. Such of them as appear to require it, I will now proceed to examine.

The plaintiff to prove title introduced in evidence a deed dated February 26, 1855, from James Terwilliger and wife, and Finice Carruthers and Elizabeth Thomas, by the terms of which ten acres of land were conveyed to the city of Portland, one half of which was on the claim of the defendant, being the land in controversy, and the other half being a part of the land claim of Elizabeth Thomas. After the granting and descriptive clauses in said deed, it proceeds as follows: "But upon these further expressed terms, conditions, and reservations, to wit, that one-fourth part of said ten acres of land shall be set apart and reserved forever, and used for and as a public burial ground; that the said tract of land shall be laid off into such lots as the said city of Portland, by its proper officers, may elect to do, and shall be sold and disposed of from time to time to purchasers, and that the proceeds arising from the sale of lots by said city of Portland shall be applied, in the first place, to the enclosure of said ten acres of land with a good and sufficient fence, and the remainder to clearing, adorning, and ornamenting said cemetery grounds; and that as a further condition the said city of Portland shall and will, immediately after the execution in full of these presents, make and deliver, without cost or charge to the grantors of this deed, a deed of conveyance to said James Terwilliger of one family burial lot in said cemetery, and to Finice Carruthers of one family burial lot therein." And in another part of said deed it is recited that it is made "for and in consideration of the covenants, promises, and agreements contained in a certain instrument of writing, dated August 24, 1854, made and entered into between the aforementioned parties of the one part, and the city of Portland, a body corporate and politic in fact and in law, on the other part, and in consideration of the same on the part of the city of Portland having been done, per-

formed, and concluded, and in further consideration of the sum of one dollar to us in hand paid," etc.

So much of the operative part of said agreement as is necessary to a proper understanding of the questions presented is as follows: "Now, therefore, the said James Terwilliger and Finice Carruthers, in consideration of the promises and agreements of the city of Portland hereinafter named, do hereby, for themselves, their heirs, executors, administrators, and assigns, covenant and agree to and with the city of Portland, a corporation, as aforesaid, that they will well and truly make, execute, acknowledge, and deliver, or cause so to be, all and every such deed or deeds, conveyance or conveyances, whatsoever, which shall be needful in conveying and confirming unto said city of Portland, a corporation as aforesaid, *a good, absolute, and clear estate and title*, free of all encumbrances, of, in, and to ten acres of land, to be in square form, for the purpose of a city cemetery, and said land to be situated on a line between the said Terwilliger's and Carruthers' land claims, five acres of which shall be taken from the north side and five acres from the south side of said division line, and all to be on the west side of and next to the territorial road from said Portland to Brown's Ferry, and that said deed or deeds, conveyance or conveyances, shall be by them so made, executed, acknowledged, and delivered, when the said city of Portland shall have expended the sum of four hundred dollars in building a road between said city and said cemetery land, and shall have laid off said land into such lots as they may elect to do; and that until said deed or deeds shall be executed as aforesaid, the said city of Portland shall peaceably and quietly hold, enjoy, and use the said land as a cemetery. And the said city of Portland, a corporation duly established by law as aforesaid, for and in consideration of the premises aforesaid, and of the covenants and agreements of the said James Terwilliger and Finice Carruthers, as *hereinbefore recited*, does hereby promise and agree to and with said Terwilliger and Carruthers, that it, the said city, will expend the sum of four hundred dollars in the building of a road from said city to said cemetery, and that one-fourth part of said ten acres of land shall

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be reserved as and for a public burial ground, and that the proceeds of all lots which may be sold from and out of said cemetery grounds shall be expended in enclosing said ten acres of land with a good substantial fence, and otherwise improving and adorning said cemetery lands; and that to said Terwilliger and to said Carruthers each the city of Portland shall and will convey one family burial lot, and that said conveyances shall be made by said city upon the execution of said Terwilliger and Carruthers of their deed or deeds of said land to said city of Portland, as aforesaid."

Upon the trial in the court below the respondent contended that the stipulations in the deed to the city of Portland were conditions subsequent, and the failure on the part of the city to keep and perform any or either of them defeated its estate in the lands granted, and that the defendant might re-enter as for condition broken. The respondent introduced evidence tending to prove that said land had not been used as a cemetery and burial ground since 1879; that the enclosure had been allowed to fall into decay, and that the land was no longer enclosed at the time the respondent re-entered in 1885; that a large number of bodies which had been buried there had been taken up and removed, and that there were but few bodies buried there now; that the ground had never been laid off in lots for burial purposes; that none of said lots had ever been sold, and that no deed for a family burial lot had ever been delivered by the city to respondent. To all of this evidence the plaintiff objected; but its objections were overruled and exceptions duly taken. The respondent then offered in evidence section 12 of ordinance No. 3983, which punishes by fine or imprisonment any person who shall inter the body of any deceased person in any lot, place, or premises within the corporate limits of said city, to which also objections were made, which being overruled, exceptions were duly taken.

The court, in instructing the jury, undertook to construe the deed to the city, which was its duty, and in construing it particularly pointed out each one of the specifications in said deed called conditions subsequent, and in effect instructed the jury that

each one constituted a condition subsequent, and that if such conditions, or any of them, were broken, the estate of the city in said property might be terminated by the re-entry of the respondent. This is the general effect of the instructions, to which exceptions were duly taken. The court further instructed the jury: "If you find from the evidence in this case that the city authorities, by an ordinance, prohibited the burial of the dead there within these grounds, then those two conditions are broken." To which, also, an exception was duly taken. The court further instructed the jury as follows: "Sometime in 1885 the legislature took in the Terwilliger portion of this cemetery into the corporate limits. This ordinance (§ 12 of ordinance No. 3983, *supra*) remained unrepealed, and operates on the Terwilliger portion as it had before operated upon the Carruthers portion, and from the passage of this act in 1885, taking that portion of the Terwilliger land into the city limits, it became unlawful for anybody to bury the dead in that portion. I instruct you that this prohibition is a breach of the conditions of this deed." An exception was also duly taken to this instruction on the part of the city. Counsel asked the court to instruct the jury as follows: "The terms, conditions, and reservations mentioned in the deed from James Terwilliger and wife and Finice Carruthers and Elizabeth Thomas to the city of Portland, and in evidence in this case, are not conditions subsequent, but must be construed as covenants merely, and a breach of them would not entitle the grantors in said deed to re-enter said premises as of first estate therein."

1. In *Raley v. Umatilla County*, 15 Or. 172, we had occasion to consider the doctrine of estates upon condition, and particularly upon condition subsequent, and reached the conclusion that courts will not favor the forfeiture of estates, and that the rule of the common law that estates upon condition may be defeated by non-performance of the condition subsequent is to be construed strictly; and that if there is any other reasonable construction which can be given to a deed so as to avoid a forfeiture, it ought to receive such construction. In *Wier v. Simmons*, 55 Wis. 637, the language of the deed was: "Upon the express

condition," etc.; but the court held that such language did not create an estate upon condition, and said: "The rule is well settled that conditions subsequent which work a forfeiture are not favored in the law, and no language will be construed into such condition contrary to the intent of the parties, when such intent can be derived from a consideration of the whole instrument, or from the circumstances attending the execution thereof; nor will the language used be construed into such condition subsequent when any other reasonable construction can be given to it. The rule was thus forcibly stated by the late chief justice in the case of *Laws v. Hyde*, 39 Wis. 345, 356, and the rule there announced is approved in these cases: *Lyman v. Babcock*, 40 Wis. 503; *Morse v. Ins. Co.* 30 Wis. 534; *Jackson v. Silvernail*, 15 Johns. 278; *Hadley v. Hadley*, 4 Gray, 140; *Osgood v. Abbott*, 58 Me. 74; *Merrifield v. Cobleigh*, 4 Cush. 178." So it was said in *Woodworth v. Payne*, 74 N. Y. 196: "Conditions in grants are not favored in law, and hence they must be clearly expressed. (*Craig v. Wells*, 11 N. Y. 315.) They are also to be construed with great strictness, because they tend to destroy estates, and vigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience." And other authorities are to the same effect. (*First Methodist Episcopal Church of Columbia v. Old Columbia Public Ground Company*, 103 Pa. St. 608; *Harner v. Chicago, Milwaukee & St. P. R. R. Co.* 38 Wis. 165; *Hoyt v. Kimball*, 49 N. H. 322; *Paschall v. Passmore*, 15 Pa. St. 295; *McKnight v. Krentz*, 51 Pa. St. 232; *Mills v. Evansville Seminary Co.* 58 Wis. 135; *Cross v. Carson*, 8 Blackf. 138; 44 Am. Dec. 744, and note.)

2. Neither do the words "in trust, nevertheless, and upon condition always." To use the premises for public worship in a deed of land to a religious society necessarily create a condition. (*Solier v. Trinity Church*, 109 Mass. 1; *Stanley v. Colt*, 5 Wall. 119; *Chapin v. Harris*, 8 Allen, 594.) In *Wright v. Watkins*, 2 Best & Smith, 232, the words "upon this express condition" used in a will were held not to create an estate upon condition. These words were followed by others directing a legatee to pay certain bequests. So land conveyed to a religious

society, its successors and assigns, for a nominal consideration, upon and subject to the condition "that the society was to continue to hold, occupy, and improve the land and chapel standing thereon for the support of religious worship in conformity with the usage of the Protestant Episcopal Church," and also upon the further condition "that no building should be erected upon a certain portion of the land conveyed until after an adjoining owner had ceased to keep open a contiguous strip of land, or until after such time as the chapel should cease to be used as a chapel in accordance with the above provision," did not create an estate upon condition. (*Episcopal City Mission v. Appleton*, 117 Mass. 326.) So in *Paschall v. Passmore*, *supra*, the words "under this condition, nevertheless," in a deed did not make the estate granted conditional.

3. We may now turn to the deed from Terwilliger to the city of Portland, and the contract which preceded it. These writings are so connected together by the subject-matter, and by reference in the deed to the contract, that it cannot properly be construed without reference to the contract. It is probable that the city of Portland had, prior to the twenty-fifth day of August, 1854, the date of the agreement, under some arrangement with the defendant, or in contemplation of the execution of said agreement, been let into the possession of the land in controversy; if not before that time, certainly at the time said agreement was made, for the writing declares "that until said deed or deeds shall be executed as aforesaid, the said city of Portland shall peaceably and quietly hold, enjoy, and use the said land for the purpose of a cemetery." By the terms of this agreement the city of Portland bound itself to perform several things: (1) To expend the sum of four hundred dollars in the building of a road from said city to said cemetery; (2) that one-fourth part of said ten acres of land should be reserved as for a public burial ground; (3) that the proceeds of all lots sold should be expended in enclosing said ten acres of land with a good substantial fence, and otherwise improving and adorning said cemetery lands; (4) to convey to Terwilliger and Carruthers, each one family burial lot, upon the execution of their deed to the

city of Portland. The deed recites that it was made for and in consideration of the covenants, promises, and agreements contained in said instrument of writing, dated August 25, 1854, "and in consideration of the same on the part of the city of Portland having been *done, performed, and concluded,*" etc. The same requirements in substance are repeated in the deed after the habendum clause, and following the words, "but upon these further express terms, conditions, and reservations." The court below construed each of these specifications to be conditions subsequent, the non-performance of which defeated the estate. In this construction of these writings, I think that the court erred. The granting clause of the deed does not in any manner undertake to limit the use, but by way of general description the granted premises are referred to as "that certain piece, parcel, quantity, or tract of land situated in said county of Multnomah, *and now appropriated, claimed, and possessed* by the said city of Portland, for *and as a cemetery* for said city;" and the habendum clause recites that said premises are "for the sole and exclusive use and purpose as a cemetery for said city of Portland."

4. I doubt very much whether the defendant could, in any view of the subject, be permitted by the covenants in his deed to allege or prove the city of Portland had not performed the several covenants on its part to be performed by the terms of the agreement, for the reason it is expressly declared in the deed that the *same* on the part of the city of Portland had been done, performed, and concluded on the part of the city of Portland at the time of the execution of said deed. If this language refers to the city's part of said agreement, as I am inclined to think it does, the defendant has by his solemn admission under seal precluded himself from proving to the contrary. It is true the same requirements are repeated in the deed; but if the plaintiff had already performed them, the repetition would impose no new or additional duty or obligation.

5. This deed does not provide that if the city of Portland shall cease to use said premises as a cemetery its title thereto shall terminate, nor is any right of re-entry reserved by the

express terms of the deed. It is true these provisions are not necessary where the estate is in fact conveyed upon condition subsequent, but they sometimes become very important in construing the language of the conveyance, when its meaning would otherwise be left in doubt, and to doubt on this subject is to decide against the condition. The purposes for which this land was to be used, I think, ought to be considered in construing these writings. It was conveyed to the city as a resting place for the dead, and at the time it was conveyed no doubt all parties to the transaction supposed that it would be so used for an indefinite period of time for that purpose. The rapid growth and development of the city was not then hardly thought of. Under such circumstances it seems to me improbable that any of the parties to this deed intended that by virtue of any of its provisions that right of the city and its grantees should be defeated, and the land again be subjected to the private ownership of the defendant. Under the defendant's construction, no difference how populous the city may become, or how much the health of its inhabitants might be endangered by a grave-yard in its center, the interments must go on, at least until the ground is all occupied. If interments stop by order of the city in the exercise of its undoubted police powers, or for any cause, its title as well as the title of all who had purchased lots is terminated by the supposed condition. The defendant would again become re-invested with the estate, including the tombs and their contents, and might exercise such control and dominion over them as any other private property is subject to. I feel safe in saying that such was not the intention of the parties to these writings at the time they were executed, and a change of circumstances since they were made cannot affect their construction.

6. Looking at the writings themselves, their language, the situation of the property, the object and method of its acquisition by the city, and all the circumstances attending the transaction, so far as it is proper to consider them, I am inclined to think what the defendant claims are conditions in this deed must be held to be covenants, and that their non-observance in no man-

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ner affects the defendant's title to the property. If the defendant should fail to perform such covenants, it would be liable to an action for damages, in which the defendant might recover all such damages as he may have sustained, unless such covenants are repealed by the ordinance prohibiting the burial of the dead in the city. This construction is strengthened by the fact that the contract of August 25, 1854, contains no words which could be tortured into a condition. It contains mutual covenants, nothing more, and it would hardly seem probable that without any new agreement, so far as appears, or new or additional consideration, the parties to that contract would use language which would, or which was designed to entirely change the rights, duties, and obligations already existing between them. The rule under consideration is thus stated by a standard author: "So if the supposed condition of an executed grant amounts to an agreement on the part of the grantee to do certain things, it will not be held to defeat the estate if he fails to perform. In order that the condition in such case should defeat the estate, the grant must be in its nature executory." (2 Wash. Real Prop. p. 4.) So in *Rawson v. Inhabitants of School District No. 5, in Uxbridge*, 7 Allen, 123, Bigelow, C. J., says: "It is sometimes said when a deed is made . . . in consideration of an act to be done or service rendered, it will be interpreted a conditional estate. But this is an exception to the general rule, and is confined to cases where the subject-matter of the grant is in its nature executory, as of an annuity to be paid for services to be rendered, or a privilege to be enjoyed. But ordinarily the failure of the consideration of the grant of land, or the non-fulfillment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate." And *Laberee v. Carleton*, 53 Me. 211, is to the same effect.

7. But there is another view of this subject, which I think ought not to be passed without notice. Conceding that the estate was vested in the city of Portland on condition subsequent as to the continued use and occupation of the same as a cemetery, it becomes material to inquire what effect did the prohibition of that use by the common council have upon the title.

That power was delegated by the State to the city of Portland under the general description of *police power*. Judge Dillon, referring to this power, says: "That every citizen holds his property subject to the proper exercise of this power, either by the State legislature directly, or by public corporations, to which the legislature may delegate it. . . . Still he owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally. These regulations rest upon the maxim, *salus populi suprema lex*." (2 Dillon on Municipal Corporations, § 141.) *Coates v. The Mayor, Alderman, and Commonalty of the City of New York*, 7 Cowan, 585, is a leading case on this subject. The question involved was the right of the city of New York, acting through its proper legislative department, to prohibit the burial of the dead within the corporate limits of said city. The defendant sought to justify by showing that the interment took place in a part of a close called Trinity Church Yard, situate in the first ward of the city of New York, mentioned, etc., in certain letters patent, dated May 6, 1697, granted under authority of William III., king of Great Britain, etc., whereby divers persons were constituted a body corporate by the name of the rector and inhabitants of the city of New York, in communion of the Protestant Episcopal Church of England."

The letters patent confirmed to that corporation, and to their successors forever, the piece of land, as and for a church-yard, cemetery, and burying-place, with the rights, customs, fees, perquisites, profits, etc., as the same were then in the possession of that corporation; that at and immediately after the grant the land was appropriated by the corporation as a cemetery and burying-place, for the interment of dead bodies within the same, as and for certain fees, perquisites, and profits then and there charged, demanded, taken, and received for such interments, respectfully, to the use and benefit of the corporation, etc.; that the defendant was the sexton, and in the service and employment of the church, and as such had charge or custody

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of the vault or tombs, and interred and deposited the dead body as he lawfully might. But the defense was disallowed, the court saying: "But if there be a covenant for quiet enjoyment it is repealed. We held in the *Brick Presbyterian Church v. City of New York*, 5 Cowen, 538, in relation to this very by-law, that it repealed all covenants entered into by the corporation, incompatible with the by-law; that it was equivalent, in this respect, to an act of the legislature, rendering the enjoyment, which was the object of the covenant, unlawful." The case in 5 Cowen, *supra*, is even stronger. There the defendant had conveyed the premises to those whom the plaintiffs represented. By the deed the lessees covenanted for the payment of an annual rent, and also that within ten years the premises should be enclosed in a fence, and that a church should be built thereon, or the premises should be used as a cemetery, and also that they should never be used for private secular uses. The defendants covenanted that the lessees and their assigns, paying the rent and performing the conditions, should quietly use, occupy, and enjoy the premises, without any let or hindrance of the defendants, or any other person, etc. The court held in substance in that case that the defendants had no power as a party to make a contract which should control or embarrass their legislative powers and duties. Their enactments in their legislative capacity are to have the same effect upon their individual acts as upon those of any other persons, or the public at large, and no other effect. The liability of the defendants, therefore, upon the covenant in question must be the same as if it had been entered into by an individual, and the effect of the by-law upon the same as if that by-law had been an act of the State legislature. . . ." The court then held that the by-law repealed the covenant, and that the defendant was not liable thereon, citing 1 Raym. Ld. 317, 320, to this effect: "For the difference when an act of Parliament will amount to a repeal of a covenant, and when not, is this: when a man covenants not to do a thing which was lawful for him to do, an act of Parliament comes after and compels him to do it, then the act repeals the covenant; and *vice versa*. But when a man covenants not to do a thing

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which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant." And these cases have been since followed in New York, and have never been questioned. (*The Mayor etc. v. Second Ave. R. R. Co.* 32 N. Y. 261; *Britton v. The Mayor etc. of N. Y.* 21 How. Pr. 251; *The Opening of Albany Street*, 6 Abb. Pr. 273.)

8. It would seem to follow from what has been already said that the city lost no rights and forfeited no property by the exercise of its undoubted police powers. It was a public legislative power vested in it, to be exercised for the purpose of securing and promoting the health, peace, and good order of the city, and it could not be fettered in any manner, either by contract or otherwise. It is true the burial of the dead at the place in question was lawful at the date of the deed, but the common council by the passage of the ordinance rendered it unlawful. Now assuming this deed to have been made upon a condition subsequent, if this ordinance had been in force at the date of the deed, the condition would have been unlawful, and the grantee would have taken the estate freed from the condition. (*Weathersby v. Weathersby*, 13 Smedes & M. 685; *Rogers v. Sebastian*, 21 Ark. 440; *Randall v. Marble*, 69 Me. 310; *Barksdale v. Elam*, 30 Miss. 694.) And there is authority for holding that the same result follows where there is a change in the government; it becomes illegal or contrary to the policy of the laws. (*Wheeler v. Moody*, 9 Tex. 372.) And the same principle seems to be recognized in *Davis v. Gray*, 16 Wall. 203, where the head note is as follows: "When the State of Texas had made to a railroad company a large grant of lands, defeasible if certain things were not done within a certain time by the company, the fact that the so-called secession of the State and her plunging into the war, and prosecuting it, rendered it impossible for the company to fulfill the conditions in law, abrogated them."

The ruling of the court below being inconsistent with what is here said, the same was erroneous. The judgment will therefore be reversed, and the cause remanded for a new trial.

STRAHAN, J., on rehearing. — Counsel for respondent on this

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application contend that the city of Portland could not, by prohibiting the burial of the dead within the corporate limits of the city, destroy the alleged condition upon which the city held the property, and thus by her own act defeat the condition and hold the property freed from it. All of the authorities cited in the opinion as to the effect of a condition, if unlawful when made, or if it become afterward unlawful, are against counsel's position. But by oversight the opinion does not contain a clear statement of the facts on this point. Section 12 of ordinance No. 3983 makes it penal to inter a dead body in any lot, place, or premises within the corporate limits of the city of Portland. This ordinance was passed and approved on the thirteenth day of October, 1883. At that time the demanded premises were not within the corporate limits of the city; but afterwards, on the twenty-fifth day of November, 1885 (Acts 1885, pp. 103, 104), the legislature passed an act enlarging the boundaries of the city so as to include the property in controversy. The ordinance prohibiting the burial of the dead within the corporate limits of the city thus became operative over the new territory included in the city, but not by the act of the corporate authorities of the city of Portland.

It was by the act of the legislature, extending and enlarging the corporate limits of the city, that said ordinance was made to affect the property in controversy. I think the effect would be the same in either case; but under these facts it cannot be said that the ordinance in question was made operative on this property by the immediate act of the city or its officers.

I have carefully re-examined the conclusions already announced and do not find any sufficient reason to change or modify them. The motion for rehearing must therefore be denied.

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[Filed July 28, 1888.]

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e48 263

JOHN GLIEM, RESPONDENT, v. THE BOARD OF COMMISSIONERS FOR THE SALE OF SCHOOL AND UNIVERSITY LANDS, APPELLANT.

SCHOOL LANDS.—A person who has purchased from the board of commissioners for the sale of school and university lands, under the act of the legislative assembly of the State, providing for the selection, location, and sale of State lands, etc., approved October 18, 1878, the *maximum* quantity of land he was authorized to purchase under the act, is not thereby disqualified from taking an assignment of a certificate of purchase issued by the board to an applicant under the act, nor from receiving a deed from the board for such land in his own name.

SCHOOL LANDS, SALE OF—HOW EFFECTED.—Where one K. held a certificate from said board of commissioners for the purchase of one hundred and sixty acres of land, under the act above referred to, and assigned the same to G., and G. after the assignment to him made full payment to the board of the amount of the purchase price unpaid, and delivered to the board such certificate and assignment, *held*, that G. was entitled to a deed from the board to the land in his own name, notwithstanding it appeared from the records of the board that a deed had theretofore been executed to him for the full amount of land, which he was entitled to apply to purchase under the act. *Held, further*, that a sale under the act consisted of the application to the board to purchase such quantity of the land as the applicant was entitled to apply to purchase, the payment of the proportion of the purchase price thereof, the execution of the promissory notes for the balance of the purchase price, as provided in the act, and the execution to the applicant of the certificate of purchase, and that the limitation upon the quantity of the land a party was entitled to purchase under the act only applied to such sale, and not to the purchase or assignment of a certificate of sale from the party to whom the same had been issued.

APPEAL from the Circuit Court for the county of Marion.

E. P. McCornack, for Respondent.

P. H. D'Arcy, for Appellant.

THAYER, C. J.—This case involves the right of the respondent to a deed from the appellant to a tract of State lands, consisting of one hundred and sixty acres in section 15, T. 39 S., R. 9 E. The respondent claimed to be entitled to the deed as assignee of a certificate of sale from one George W. Karnes, to whom it was issued by the appellant.

It appears that said Karnes, on the second day of December, 1881, applied to the board of commissioners for the sale of school and university lands for the purchase of said land, under

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the provisions of the act of the legislative assembly of the State, providing for the selection, location, and sale of State lands, etc., approved October 18, 1878. The application was made in accordance with section 5 of said act. The applicant, upon filing the said application, duly paid to the said board one third of the purchase price, and executed his promissory notes for the remaining two thirds, as provided by section 6 of said act, whereupon the said certificate was issued to him. That on the twenty-eighth day of January, 1885, said Karnes duly assigned and transferred the said certificate to the respondent, which assignment was executed as provided by section 11 of said act. That on the twenty-eighth day of May, 1888, the respondent, as assignee of the said George W. Karnes, made full payment of the amount due on the purchase price of the said lands, in accordance with the terms of the said certificate of sale, and thereupon delivered the certificate to the said board, together with the said assignment, and demanded from the board a deed to the said lands to him in his own name. The board thereupon refused to execute such a deed to the respondent, for the reason that it appeared from the records of the board that a deed had theretofore been executed to respondent for three hundred and twenty acres of land, and that the respondent had acquired all the land under the said act which he was entitled to purchase.

The only question presented to this court for its consideration herein is whether the appellant was justified in refusing to execute the deed to the respondent, upon the grounds referred to. Said section 5 of said act limits the quantity of land in such cases that any one person is entitled to purchase to three hundred and twenty acres, in case of a settler, and to one hundred and sixty acres in case of a non-settler; and the board seems to have been of the opinion that, as the respondent had already purchased under the act three hundred and twenty acres of land, he was not entitled to the deed. This was clearly an erroneous view. If the respondent had been an applicant to purchase the one hundred and sixty acres of land in question, the board would have had an undoubted right to reject his application, for the reason assigned in refusing to execute the

deed. But the respondent was not before the board in the character of a purchaser. He was not applying to *purchase* the land. He was applying as assignee of the certificate issued to Karnes for a deed in pursuance of section 11 of said act, which provides, that "all assignments of certificates of sale shall be executed and acknowledged in the same manner as a deed to real estate; and the assignee, upon full payment of the amount due on the purchase price, and delivery to the board of such certificate and assignment, shall receive a deed for the lands described in such certificate, in his own name, as if he were the original purchaser."

The one hundred and sixty acres had already been sold. It was sold to Karnes on the said second day of December, 1881, and the board would not have sold it again by executing the deed to the respondent any more than it would by executing the deed to Karnes himself. Selling land under the provision of the act to an applicant who applies under said section 5 to purchase it is the only sale provided for in said act, and the only one to which the limitation of quantity to a purchaser is made applicable. According to the view the board must have taken, there would be two sales of land under the act in every case; one when the application to purchase was accepted by the board, and the other when the deed was executed; while the act itself recognizes the former transaction as the sale, and the latter, as the receiving of the deed.

The certificate which the applicant is entitled to receive from the board, upon payment to the board of one third of the purchase price, and executing the notes for the two thirds, is required by said section 6 of said act to show that he *has* purchased the land therein described, has paid a certain sum thereon, and has executed the promissory note for a certain other sum, or other sums, and on payment of such notes, principal and interest, will be entitled to a deed therefor. The legislature evidently intended that when the certificate of purchase was issued to the applicant, the purchase was then made, and I do not see how the act can be construed otherwise. The policy of the law, no doubt, was to prevent an applicant from purchasing more of

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the State lands than the quantity mentioned; but it could hardly have been expected that it would be the duty of the board to undertake to prevent their transfer after they were sold. Nor will a refusal upon the part of the board to execute deeds to assignees of certificates of purchase have the effect to prevent such transfer, or restrict parties from acquiring such an amount of the lands as they may desire to buy. It can have no other result than to embarrass and incommode the vendor and purchaser in the transfer of the title. If the vendor were not permitted to assign the certificate, and thereby enable the purchaser to make payment of the amount due on the purchase price, deliver the certificate and assignment to the board, and receive a deed, still he could make such payment himself, receive the deed from the board, and then convey the land to the purchaser. This, of course, would necessitate the making and recording of an extra deed, and the cost and expense thereof would in three cases out of four fall upon the vendor. I am unable to perceive how the public good could be subserved by requiring such a course to be pursued. It appears to me that it would be liable to operate more injuriously than beneficially; but however that may be, I am satisfied that the said act will not admit of such a construction as will render it necessary to pursue it.

The language of said section 11 of the act is as plain as words can make it. It unmistakably authorizes an assignment of the certificate of sale, the payment by the assignee of the balance due on the purchase price of the land, and the receipt by him of the deed therefor. Nor does the language of the section require the assignee or purchaser of the certificate to possess any particular qualifications in order to entitle him to become such assignee or purchaser; and the attempt upon the part of the board to prescribe the qualifications he shall possess, or conditions upon which the assignment or purchase shall be made, is a usurpation of legislative functions.

The judgment of the Circuit Court awarding the mandamus will be affirmed.

OCTOBER TERM, 1888.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

OREGON.

OCTOBER TERM, 1888.

Filed October 11, 1888.]

A. W. LAMBERT, APPELLANT, v. ROSE LAMBERT,
RESPONDENT.

DISSOLUTION OF MARRIAGE.—When a decree is given dissolving a marriage, the care and custody of the minor children should be given to the party not in fault, unless there is evidence showing that it would be manifestly improper to do so, and a special finding of fact made by the court to that effect.

CARE AND CUSTODY OF MINOR CHILDREN.—In providing for the future care and custody of the minor children in such a case, the principal matter for consideration is, what will be to their best interest and welfare, which should be paramount to every other motive or influence.

APPEAL from the Circuit Court for the county of Multnomah.

Williams & Williams, for Appellant.

Stott, Waldo, Smith, Stott & Boise, and *Coxles & Mulkey*, for Respondent.

PER CURIAM.—This appeal is from a part of a decree rendered in a suit brought by the appellant against the respondent to obtain a divorce, and to have the custody of their minor child, Albert Lambert, a boy ten years of age, awarded to him. The

Per Curiam.

Circuit Court granted the appellant the divorce, but gave the custody of the child to the respondent upon condition that she continue to reside in the city of Portland; and directed that the appellant pay to her five dollars a month for its support. It is also provided in the decree that the child shall not be removed from Multnomah County, ~~and that~~ the respondent execute a bond in the sum of five hundred dollars, with ~~sureties~~ that she will not so remove it. The decree also contains a further provision, that in case the respondent failed to comply with its terms in the particulars referred to, or if she changed her residence from said county, then the custody of the child should be given, without further order of the court, to J. H. Lambert, its grandfather.

The appeal is from the part of the decree awarding the custody of the child to the respondent. The Code provides that whenever a marriage shall be declared void or dissolved, the court shall have power to further decree, among other things, the care and custody of the minor children of the marriage, as it may deem just and proper, having due regard to the age and sex of such children, and unless otherwise manifestly improper, give the preference to the party not in fault. (Code, subd. 1, § 402.) There was no finding of fact in this case, nor any evidence therein showing that it would have been improper to give the care and custody of the minor child, Albert Lambert, to the appellant. The testimony shows that the appellant is engaged in business, and much better able to support the child than the respondent, and its age and sex favor his being given such preference. We are of the opinion, in the absence of a finding and proof, that it would have been improper to award the care and custody of the child to the appellant; the Circuit Court was not justified in giving the respondent the preference in that regard.

The most important consideration in such a case is the best interests of the child, which parental sentiment too often disregards. Besides, the contention between them as to which shall have control of the child is apt to arise out of a spirit of rivalry and jealousy. It is claimed in this case that the respondent is

Points decided.

shown to possess a stronger affection for the child than the appellant does. If this were conceded, it would be no ground for awarding its custody to her, unless its substantial benefit would be promoted thereby. In our opinion it would be far better for the child if he were placed in charge of his grandfather, J. H. Lambert. We are induced to believe so from the facts and circumstances of the case, and a knowledge we have obtained of Mr. J. H. Lambert's character, standing, and surroundings.

The decree of the court will therefore be, that the care and custody of the minor child, Albert Lambert, be given to the said J. H. Lambert, and that the appellant and respondent have liberty at all proper times to visit it. That the decree appealed from be modified in accordance with this view, and neither party shall be entitled to costs or disbursements.

[Filed October 16, 1888.]

S. MITCHELL, APPELLANT, v. IRA F. POWERS,
ASSIGNEE, RESPONDENT.

CONSTITUTION—FINAL DECISION OF CIRCUIT COURT—HOW REVIEWED.—Under the Constitution of this State, the Supreme Court has jurisdiction to revise the final decisions of the Circuit Courts in all cases, whether rendered in the exercise of common-law jurisdiction, or in the exercise of jurisdiction derived wholly from the statute, and whether the statute has given the right of review or not.

STATUTE PROVIDES MEANS OF REVIEWING SUCH FINAL DECISIONS.—Where the mode of review of final decisions of the Circuit Courts is not specifically pointed out, the Code authorizes any suitable process or mode of proceeding to be adopted, conformable to its spirit.

APPEAL—WHEN LIES.—In pursuance of which authority rule 14 of this court was adopted, providing that the mode of revision of final decisions of the Circuit Courts in such cases shall be by appeal, as in cases of appeal in judgments at law; and questions of fact shall not be considered upon such appeal unless made a record in the form of a *bill of exceptions*. In view of these premises, *quære*, has this court the right to consider intermediate proceedings under the insolvent act of this State, unless authenticated in accordance with said rule?

BILL OF EXCEPTIONS—WHEN NECESSARY—QUÆRE.—Where in an appeal from the decision of the Circuit Court in proceedings of insolvency, the record fails to disclose that any final decision was made therein, this court will not consider the same until the record is completed in that particular.

16	487
18	344
19	647
23	1107

16	487
31	473

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APPEAL from the Circuit Court for the county of Multnomah.

X. N. Steeves, for Appellant.

E. B. Williams, for Respondent.

THAYER, C. J.—This is an attempt to review various rulings and decisions made by the said Circuit Court in proceedings of insolvency. It appears from the mass of papers filed in this court as a transcript, that one Julius Levi, on the twenty-third day of February, 1887, made an assignment to the appellant, S. Mitchell, for the benefit of his creditors, under the insolvent law of this State. In the list of creditors set out in the assignment, said Mitchell and the other appellants, S. H. Abrahams and W. Friedlander, were included as being entitled to the respective sums of two thousand two hundred dollars, four hundred and fifty dollars, and two hundred dollars. That subsequently, upon petition of other of the creditors of the said Levi, the said Circuit Court made an order directing the clerk thereof to order a meeting of all the creditors of the insolvent for the purpose of choosing an assignee in place of said Mitchell. That about the time of such meeting of said creditors, the said Circuit Court made an order enjoining the said Mitchell from voting or participating in any manner in the election of such assignee, and that in consequence thereof he did not vote thereat. That the said clerk certified to the court that the said meeting was held in accordance with said order, and resulted in the election of the respondent Powers as such assignee. That said Circuit Court thereupon made an order directing that the said Mitchell forthwith deliver over to said Powers all the property of said estate. That thereafter, on the petition of and a showing made by said Mitchell, the said court set aside the said certificate and return of the said clerk, and declared that there had been no election; and then proceeded of its own motion to appoint the said Powers as such assignee, and directed him to sell the property of the estate. Said Powers, it seems, qualified and acted as assignee; but in his first quarterly report to the court of his proceedings he did not include the appellant and one other party named in

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the said list of creditors as creditors of the estate, stating in his report that they had not exhibited their claims. That afterwards, and on the twenty-third day of January, 1888, the said Circuit Court, upon the petition of N. Burnstein, a creditor of the estate, made an order commanding the said assignee, Powers, to show whether or not any other or different claims against said estate than those mentioned in said report had ever been presented to him, and especially claims on the part of the appellants, and requiring him, if any other claims had been presented, that he make profert of them to the court.

The transcript contains what purports to be the answer of the said assignee, made in pursuance of said order, which states that he had reported to the court all claims presented to him therein; that the pretended claims of the appellants had never been legally presented or exhibited to him, or shown, except that certain papers were handed him within the time allowed by law for exhibiting claims purporting to be copies of promissory notes held by the appellants respectively, and that they were attached to the answer as a part thereof. The answer contained a further statement that said pretended claims were fraudulent, and were attempted to be presented for the purpose of defrauding the other creditors of the assignor.

This answer appears to have been filed January 28, 1888, but it does not appear that any further action was had thereon. It appears that on the eighteenth day of May, 1888, the assignee filed his final account, asking the court for an order declaring a certain dividend in favor of the creditors included in his report, to be paid *pro rata* out of the money in his hands; and that on the twenty-first day of May, 1888, the court heard the motion and took the matter under advisement. That on the twenty-fifth day of May, 1888, a petition on behalf of said Mitchell was filed in said court, praying for an order and judgment allowing his claim and those of the other appellants; that said assignee be required to pay each of said claimants a *pro rata* dividend with all the other claims against the estate, and that the final account of the assignee be not allowed in any settlement of the estate until after the hearing of the said petition. That there-

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upon the said court made an order that the assignee appear and answer the petition within five days; and that in pursuance of such order the assignee filed an answer denying all the material averments contained therein. That on the eleventh day of June, 1888, the appellants filed a paper, which read as follows:—

“In the Circuit Court of the State of Oregon for Multnomah County.

“In the matter of the assignment of Julius Levi, insolvent debtor.

“Now comes the petitioner, S. Mitchell, and moves the court that the petition and answer thereto herein filed for a payment for and on the claims of S. Mitchell, W. Friedlander, and S. H. Abrahams, herein, out of the moneys in the hands of the assignee, and for a share of the dividends.

“X. N. STEEVES, Attorney for Petitioner.”

I have explored the batch of papers brought here and filed as a transcript, and am unable to find that any decision was made on the said motion, or on the petition and answer last referred to, or anything done in the proceedings except the service and filing of a notice of appeal, and giving security to perfect an appeal to this court. The notice of appeal states that the petitioner, S. Mitchell, appeals, etc., from the order and judgment given and rendered therein by the said Circuit Court on the twenty-eighth day of June, 1888, and then sets out the parts of the supposed order and judgment appealed from. It also states that said appellant appeals from the various other orders made by the said court herein referred to; but it nowhere appears in said transcript that any order or judgment was given or rendered by the said Circuit Court on the said twenty-eighth day of June, 1888, nor is there anything in the transcript except the notice of appeal indicating that said court had ever given or rendered any such order or judgment as that referred to as having been rendered at said last mentioned date. There is therefore no questions appearing upon the transcript which this court could review if it had power to do so, except the intermediate orders referred to. Such orders, however, in proceedings of insolvency,

are not appealable. Our decision in *In re Estate of Goldsmith et al. Insolvents*, 12 Or. 414, is decisive of that question.

Although final judgments of the Circuit Courts in such proceedings may be revised by this court, I think the Constitution confers upon it jurisdiction of that character in all cases, whether the statute expressly provides for it or not. The greatest difficulty encountered, however, in the exercise of such jurisdiction, where the statute has failed to provide the mode to be pursued, is the adoption of the one most suitable. The Code contains a general provision, to the effect that any suitable process or mode of proceeding in such a case may be adopted, which may appear most conformable to its spirit. (Code, § 940.) But as to what course of proceeding might appear most conformable to the spirit of the Code, in revising such final judgments, where none were specifically point out, must, it seems to me, be determined by this court. We have at least so viewed the matter, and adopted the following rule: "Rule 14. The mode of revision of final decisions of the Circuit Courts, where the course of proceeding is not specifically pointed out by the Civil Code, shall be by appeal, as in cases of appeal from judgments at law; and questions of fact shall not be considered upon such appeal, unless made a record in the form of a bill of exceptions." If this rule is obligatory upon litigants, and we must so hold it, then the party to an insolvency proceeding, in order to have the final judgment rendered therein revised by this court, must appeal therefrom in the same manner as in cases of appeal from judgments at law; and if he desire to have questions of fact considered on such appeal, he must prepare a statement in the form of a bill of exceptions, containing such facts, and have it settled and signed by the circuit judge before whom the proceeding was had, the same as in the trial of actions. If the mode here indicated is pursued it will insure regular and orderly practice in matters of appeal to this court, and save the court the necessity of searching through a bundle of papers thrust together and sent here as a transcript, a great part of which do not belong to it. No papers should be included in the transcript in any case, except such as constitute the judgment roll or final record, or

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which have been made a record by being incorporated into a bill of exceptions. They cannot be considered for any purpose, and serve only to embarrass the court and counsel. We held, in *Osborn v. Graves*, 11 Or. 526, in effect, that no paper not a part of the transcript, although certified as such, could be considered on the appeal. Because an exception need not be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon the matters in writing, and on file in the court, does not preclude the necessity of making a statement of the exception. In such case an exception to the decision is deemed to have been taken. The law regards it as having been objected to, which constitutes an exception; but that is a mere challenge to the correctness of the decision; whether it is erroneous or not depends upon facts. It is often necessary to show the circumstances under which it was made in order to prove it to be erroneous. Whether the decision claimed to have been made by the Circuit Court in this case, to the effect that the appellants' claims against the insolvent's estate had not been exhibited to the assignee was correct or not, depends upon the facts which were before that court.

The appeal brings up the decision to this court because it is a part of the record of the case; but it does not bring up the facts by which the appellants seek to impeach the decision, unless they are also a part of that record. If the appellants depend upon matters resting in parol, or which are contained in writings that are not a part of the record, to impeach that decision in this court, they must necessarily fail. We have no means of ascertaining whether the decision of a Circuit Court is erroneous or not, except by examining the record of that court transmitted to us, and we cannot consider any matter sent here with the record which is not a part of it. In my opinion, the decision of the Circuit Court that the appellants' claims had not been exhibited to the assignee, if it ever made any such decision, is reviewable in this court, although the insolvent act contains no provision authorizing any such review or appeal in any case; but I think that such a decision should be deemed a final judgment within the meaning of that term as used in the Constitution and general laws of this State.

Points decided.

The decision certainly operated as a final disposition of those claims, and a perpetual bar to their recovery. But in order to show that the decision is erroneous by matters which are not primarily a part of the record, the appellants must have had them made a record in the manner indicated. We do not propose to make a final disposition of the case at this time. We leave it open, with permission to the appellants' counsel to take such course as he may deem proper in regard to supplying the record, and make these suggestions for the consideration of counsel in the further prosecution of the appeal. The clerk will notify counsel of the status of the case, and if no steps are taken within six days from this time to supply the record, the appeal will be dismissed.

LORD, J., stating the grounds of his concurrence.—As, by some oversight, the judgment from which the appeal is taken was not incorporated in the transcript, it is not possible for us to proceed without it, and I concur in the opinion that the appellant may have six days in which to supply it, so that the case may be determined on the error assigned and argued.

STRAHAN, J., expressed no opinion on the above holding.

[Filed October 23, 1888.]

STATE OF OREGON, RESPONDENT, v. C. M. HARDING,
APPELLANT.

JUROR—CHALLENGE BECAUSE NOT ON TAX ROLL.—*State v. Ching Ling*, 16 Or. 419, followed.

EVIDENCE—EFFECT OF.—Where two persons were jointly indicted for larceny, upon a separate trial of one of them for the offense, it is competent for the State to introduce in evidence the conversation between the parties and their conduct at the time, where such conversation tends to prove the larceny charged, or guilty knowledge on the part of the defendant, or the interest with which the defendant on trial received the money alleged to have been stolen.

EVIDENCE—WHEN COMPETENT.—Where upon a trial for larceny the evidence introduced upon the part of the State tended to prove that the defendant had the stolen money in his possession or under his control, such evidence is not rendered incompetent because it further appeared that the defendant proposed to spend a part of such money in a saloon in purchasing wine.

Opinion of the Court—Strahan, J.

APPEAL from Multnomah County.

H. E. McGinn, and *N. D. Simon*, for Respondent.

Moreland & Masters, and *G. H. Burnett*, for Appellant.

STRAHAN, J.—The defendant was jointly indicted with one Pearl Page for the crime of larceny, committed by them in stealing from one G. Dickinson the sum of three hundred dollars. A trial before a jury resulted in his conviction and sentence to the penitentiary for five years, from which judgment this appeal was taken. During the progress of the trial several exceptions were taken by the defendant, which I will now proceed to notice.

1. The first exception taken on the part of the defendant was to the ruling of the court in allowing a challenge to a juror by the State, for the reason that the juror's name was not on the assessment roll for the year of 1887. It does not appear whether this juror was on the regular panel or not. This brings the case precisely within the ruling in *State v. Ching Ling*, 16 Or. 419, where the same question was before this court, and where we refused to reverse a judgment under the same circumstances. A further examination of the question in this case has failed to furnish any sufficient reason for overruling our previous decision, and the same is decisive against the appellant on this question.

2. One Z. M. Larne was called as a witness on the part of the State, and testified, among other things, that he was a hack driver in the city of Portland; that on the night of March 3, 1888, at the hour of about eleven o'clock, he took the defendant Harding and Pearl Page in his hack to the Dividend Saloon on First and Stark streets, where Harding had deposited the sum of two or three hundred dollars; that when he arrived at the saloon the proprietor, McNamara, refused to deliver the money to either Page or Harding until a receipt which he had given Harding for the money was produced; that Harding was drunk and the receipt could not be found. The defendant Pearl Page asked how much money there was. Harding answered that there was "a hundred or two." The defendant Pearl Page then

said: "Yes; three or four hundred." This evidence was given without objection. The district attorney then asked the witness this question: "Did you see the defendant Harding strike Pearl Page in the back?" and the witness answered: "Yes; I did," over the defendant's objection; and this is assigned for error. The appellant's counsel insists that the object of this evidence was to degrade the defendant, and he cites *Anderson v. R. W. & O. R. R. Co.* 54 N. Y. 334, where it is said: "Any illegal evidence received under objection, having a tendency to excite the passions, arouse the prejudices, awaken sympathies, or warp or influence the judgment of jurors in any degree, cannot be considered harmless error, and so the error be disregarded on the appeal."

It does not appear to us that the object, or necessary or probable effect of the evidence objected to, under the circumstances, was to degrade the defendant, or in any way to affect his moral status before the jury. The circumstances of the case as developed on the trial, and to which no objection was or could be interposed, were far more damaging to the defendant than the fact that he slapped Pearl Page. But it appears that the theory of the prosecution was that the money was stolen by Pearl Page and delivered by her to the defendant Harding, with the knowledge on his part that the same had been stolen; that the conversation detailed by the witness related to said stolen money, and the amount thereof. Now what these parties said and did, between themselves, in relation to that money was competent evidence on the part of the State to prove the larceny, or to prove guilty knowledge on the part of Harding, and to show the intent with which he received it; and if during the conversation about the money, or while they were going to the place where it had been deposited, and where they were disputing about the amount deposited, Harding struck Page, it is not perceived on what legal principal the fact could be excluded. It was an act by the defendant in connection with the stolen property, which the jury had the right to weigh and consider with the other evidence in the case, not for the purpose of degrading the defendant, but for the purpose of enabling the

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jury to judge of the defendant's intent and guilty purpose in connection with said money. We think there was no error in the ruling of the court on this point.

3. One L. P. Kendall was called as a witness on the part of the State, and testified that he kept a saloon, and that sometime after the alleged robbery, the defendant was in his saloon and told him that *his girl* had beaten a guy out of three or four hundred dollars, whereupon counsel for the State asked the witness this question: "Didn't the defendant make a proposition to send for his girl, and that they drink wine together in your saloon?" The witness answered, over the defendant's objection: "Yes; he did. He agreed to come and spend *some of the money taken from the guy*, whereupon I said, no; you better go and square it with the guy; you can spend none of his money in my place." This evidence rests upon the same theory as that considered in the second assignment of error, and must be disposed of in the same way.

The facts disclosed by this evidence tended to prove guilty knowledge on the part of the defendant in relation to the stolen money, and that the same, or a part of it, was then in his possession. The fact that he had the money and was proposing to spend a part of it were the essential facts upon which the State relied, and these could not be excluded because the defendant proposed to spend the money in a disreputable way, nor because he proposed to spend it in a particular place, whether the same be a reputable or a disreputable place. The bill of exceptions was signed after the close of the term, and without any extension of time being allowed by order for that purpose. The district attorney moved in this court to expunge the same from the transcript, because it constitutes no part of the judgment roll.

We do not think it necessary to consider that motion, for the reason that our examination leads to an affirmance of the judgment of the court below, and it is so ordered.

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[Filed October 30, 1888.]

STATE OF OREGON, RESPONDENT, v. JOHN D. HUNSAKER, APPELLANT.

16	497
19	427
19	443
19*	605
24*	401
24*	407

WITNESS—IMPEACHMENT.—Before a party against whom a witness is called can impeach him by proving contradictory statements of the witness, he must, while the witness is on the stand, call his attention to such statements, reminding him of the time, place, and persons present, and give him an opportunity to explain them.

16	497
37	88.

EVIDENCE IN CHIEF—REBUTTAL.—In a criminal case the State cannot be permitted to withhold a part of its evidence in chief, and then introduce it in rebuttal after the defendant had rested his case.

EVIDENCE.—Power of the court to examine in criminal cases far enough to see whether or not there is any evidence to sustain a conviction stated but not decided.

APPEAL from Grant County.

M. D. Clifford, for Respondent.

H. B. Nicholas, for Appellant.

STRAHAN, J.—On the sixteenth day of November, 1887, the defendant was indicted by the grand jury of Grant County, Oregon, for the crime of larceny, by stealing a horse. At the April term, 1888, of the Circuit Court of that county, he was tried before a jury and found guilty, and sentenced to the penitentiary, from which judgment he has appealed to this court. Upon the argument here there was no appearance by the district attorney, and we are therefore compelled to proceed to consider the case without the assistance of that officer; but as far as practicable, we have endeavored to examine fully the questions made by the appellant and relied upon here, and I will now proceed to state the result of such examination.

There was some testimony on the part of the State tending to prove that one M. Roach and Abe Sharp had formerly been in the business of raising horses together; that when they divided the horses this one, or one resembling him very much, fell to Roach; that Roach's portion was branded thus: —U, and Sharp's thus: U—; that the horse in question was afterwards found in the possession of the defendant, who claimed the same, or that

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he had "long eared" him, and that the brand had been changed by having another brand placed over it.

Abe Sharp was called as a witness in behalf of the defendant, and testified in substance: "The increase was divided in 1886. I think we divided sometime in June, 1886. All the increase that fell to Roach was branded thus: -U, and mine was branded thus: U-. The U was two inches long. There was not one branded down near the bar of Roach's iron two inches long, with scant of two inches. I don't think the animal in dispute is among Roach's share. There's some resemblance. Ramsey is mistaken in the horse. I know 'the mule.' This is not 'the mule.' The horse called 'the mule' was Roach's individual horse. This horse resembled 'the mule.' I did the main riding on the range. Roach and I were partners. I have seen horses as badly branded as this one."

After the defendant had rested his case, the district attorney recalled Mr. Ramsey, and asked him the following question: "State whether or not, during the month of July, 1886, at your place at Haystack, in Grant County, Oregon, you had a conversation with Abe Sharp, in which Abe Sharp said to you: 'Roach got the mule in the division of the horses,' or words to that effect?" To this question defendant's counsel objected, among other things, for the reason that no proper foundation had been laid for such question, by calling Sharp's attention to such conversation while he was on the stand, reminding him of time, place, persons present, etc. To this objection the district attorney said that this question was not asked the witness for the purpose of impeaching Abe Sharp, but for the purpose of contradicting him. The court thereupon overruled the objections, and the defendant's counsel saving proper exceptions, the witness answered: "Yes; I think it was that time, if I am not mistaken. It might have been the first of August, but I think it was that time."

1. The witness attacked by this question was not the State's witness, and he is not therefore within the rule prescribed by section 838 of Hill's Code, as to contradicting a party's own witness. This was plainly an attack by the party against whom

the witness was called for the purpose of his impeachment, and nothing else, and must be governed by the rules of law applicable to the law of impeachment. These are concisely declared by sections 840 and 841 of Hill's Code. These sections introduce no new principles. They are simply declaratory of the common law upon that subject. (*Sheppard v. Yocum*, 10 Or. 402; 1 Greenleaf on Evidence, § 462, and note; Stephen's Digest of Evidence, art. 131.) The court manifestly erred in allowing this question to be answered. Its effect, and only effect, was to impeach Abe Sharp, and this could not be done by proving contradictory statements, without first calling his attention, giving its substance, and mentioning the time, place, and persons present, etc., for the purpose of giving him an opportunity to offer such explanation as he might in relation to the alleged contradiction. This evidence was illegally placed before the jury. It is not for us to say what effect it had upon their minds. It is enough if it was illegally before them. It was of such a character that it might have proven highly prejudicial to the defendant. In such case we have no discretion, but must reverse the judgment and award a new trial.

2. Another error which would also require a reversal was committed by the introduction of the testimony of Joseph Putnam, claimed by the district attorney to be in rebuttal. Numerous witnesses, both for the State and the defendant, were called, who described minutely and with particularity the brand on the animal in question, and then after the defendant had rested Joseph Putnam was called by the State. The record recites *in rebuttal*, and he was asked a number of questions as to the appearance of the brands on the horse in dispute by the district attorney, over the objections of the defendant. I think this was improper. The State was bound to exhaust its evidence in chief before the defendant's witnesses could be heard.

After the defendant had closed his evidence the State could not re-open the case and give additional evidence to support its case without special leave of the court, obtained for that purpose, which was not done. This evidence was in no sense *rebuttal*. It was cumulative evidence, tending to support the

Points decided.

State's contention, and ought to have been introduced in chief, and before the State rested. (Hill's Code, § 196, subds. 2, 3.)

The transcript does not purport to contain all of the evidence, nor would we feel called upon to review it if it did; but so far as appears from the evidence contained in the record, proof of a felonious intent or taking seems to be wanting. The defendant had the animal in dispute in his possession, and claimed it as his own. If he made the claim in good faith he could not be guilty of larceny, although the jury may have been of the opinion the animal belonged to Roach. So far as I am able to discover, the case seems to have been tried upon the theory that if the animal belonged to Roach the defendant was guilty of larceny. While it has not generally been the practice of this court to look into the evidence in criminal cases to see whether the verdict is justified by it or not, still I think the power of the court to do so, or at least to examine the record far enough to see whether or not there is any evidence to support a conviction, is beyond question. But we do not consider or decide that matter now.

The judgment of the court below will be reversed, and a new trial awarded.

[Filed November 5, 1888.]

**AARON MEIER, APPELLANT, v. THE PORTLAND
CABLE RAILWAY COMPANY, RESPONDENT.**

DEDICATION.—Where the owner of land lays it off into blocks, lots, and streets, platting it as an addition to a city, and causes the plat, although not acknowledged so as to entitle it to record, to be recorded in the book of deeds, in the office of the clerk of the county in which the land is situated, and sells and conveys any of the lots or blocks by a reference in the description thereof to such plat, it constitutes an irrevocable dedication to the public of the streets shown upon it, and where the limits of the city are subsequently extended so as to include such addition, the corporate authorities thereof have the right, at any time, when the public necessities require it, to use such streets as public thoroughfares. It is not essential in such cases to the validity of the dedication that the city authorities formerly accept it, or proceed at once to have the streets opened and improved. The dedication only implies that the streets will be used as such when the public exigencies require it; and until they are opened and improved they remain in abeyance. A party making a dedication of streets in such manner

16 500
18 142
20 186
22 447
19* 610
22* 1062
25* 387
30* 227

16 500
23 183
19* 610
31* 480

16 500
41 259

16 500
42 616

18 500
44 178
44 179

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can only reclaim their use when the object and purpose of making it have utterly failed. Where T. C. and M. C., owners of land, sold and conveyed a portion thereof to one F., which was described in the deed of conveyance as a part of a certain block in a certain addition to the city of P., and referred in the description thereof to a plat of said addition as recorded in a certain book of deeds in the office of the clerk of the county of M., that being the county in which the land was situated, and the evidence in the case disclosed that the plat was recorded as referred to in the deed, and the other deeds were shown to have been executed to lots in such addition by reference thereto, and that the records failed to show that any other plat of said addition had been recorded at the time; *held*, that said references amounted to a recognition that the plat was real, and that the evidence was sufficient to authorize the jury to find that T. C. and M. C. made it and caused it to be recorded; *held, further*, that the transaction amounted to a dedication of the streets shown upon such plat, and that neither the said T. C. and M. C. nor their grantees had any authority to revoke it as to any of them. *Held*, that the grantees from the parties making such dedication had no authority to make a new map or plat, substituting a new street or way in place of an old one, without the consent of the purchasers of blocks and lots under the former plat, and of the public. *Held*, that although a common-law dedication of land does not pass the legal title thereto out of the party making it, yet that it is sufficient to defeat an action at law for the recovery of the possession of the property as against those who are using it, in accordance with the object and purpose for which it is dedicated. *Held*, that where a plaintiff in an action for the recovery of the possession of real property, and damages for wrongful withholding of it, seeks to aggravate the damages by showing a special injury to the freehold, the defendant has a right to show that the acts consisted in the erection of a structure thereon; that the plaintiff would succeed to the title to it in case of recovery; and that it would be valuable to him.

APPEAL from a judgment of the Circuit Court for the county of Multnomah.

Mitchell, McDougall, Tanner, and Bower, for Appellant.

Dolph, Bellinger, Mallory & Simon, and Whalley, Bronough & Northrup, for Respondent.

THAYER, C. J.—The appellant commenced an action in the said Circuit Court against the respondent, a private corporation, to recover the possession of certain real property described as lot No. 2, block No. 44, in Carter's Addition to the city of Portland, in the county of Multnomah, and State of Oregon, as laid out on the duly recorded map and plat of said addition. The appellant alleged in his complaint ownership of the property in fee-simple, his right of possession to it, a wrongful entry and withholding by the respondent, and damages in consequence thereof in the sum of five hundred dollars.

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The respondent, in its answer, denied the said allegations of the complaint, and averred that the said property was, at the time referred to, and still continued to be, a public street, duly dedicated as such by the original donee thereof from the United States, and through whom the appellant derived his alleged title; that it is a part of Fifteenth Street in the city of Portland, and that the respondent was duly authorized by said city to enter upon and use the said street and property for the cable railway. The appellant in his reply denied the dedication and the authority from the city to use the property as alleged. The cause was tried by jury, and the main point of contention was as to whether the *locus in quo* had been dedicated as alleged in the answer.

The appellant gave in evidence a chain of mesne conveyances from Thomas Carter and Minerva Carter, donees of a land claim from the United States, including said Carter's Addition to the city of Portland, down to himself. Also a plat of Carter's Addition to the city of Portland, dated November 2, 1871, executed and acknowledged by J. S. Smith and wife, L. F. Grover and wife, C. M. Carter and wife, and T. J. Carter and wife, recorded in book of records of deeds of Multnomah County at pages 488 to 491 inclusive. He then introduced evidence tending to show that respondent, on the twenty-sixth day of October, 1887, against the protest of the appellant, entered upon said premises, tore down and removed the fences therefrom, dug numerous trenches from five to ten feet deep, and erected thereon trestle-work, from sixty to seventy feet in height, upon which to operate its cable road.

The respondent to maintain its defense gave in evidence a plat marked "Plat of Carter's Addition to the city of Portland," recorded May 28, 1868, in Book H, of records of deeds of Multnomah County, at pages 708 and 709 thereof. Said plat was not acknowledged, nor did it appear by whom it was recorded; but respondent's counsel in connection therewith gave in evidence a deed, executed by the said Thomas Carter and Minerva Carter, his wife, and T. J. Carter, to one John Flinn, dated February 24, 1871, which purported to convey to said

Flinn, in consideration of four hundred dollars, certain premises referred to therein, as that certain piece or parcel of land known and designated on the plat of Carter's Addition to the city of Portland, recorded in records of deeds for Multnomah County in Book H, page 708, as the N. W. quarter of block C, according to said map or plat, and which reference was followed by a description of the premises conveyed by metes and bounds. Said counsel also gave in evidence deeds executed by said T. J. Carter and C. M. Carter to other parties prior to the date of said plat of November 2, 1871, which contained in the description of the premises conveyed reference to said Carter's Addition to the city of Portland, but did not mention any plat. Evidence was also given, on the part of the respondent, tending to show that the plat of Carter's Addition to the city of Portland, recorded in Book H of deeds, at pages 708 and 709, was the only plat of Carter's Addition to the city of Portland recorded in said records of said county prior to the second day of November, 1871, and that "Fourteenth Street," as designated on said plat of May 28, 1868, included the premises in controversy, and corresponds with "Fifteenth Street," as designated on the plat of November 4, 1871.

It further appeared in proof that in the conveyance from Thomas Carter and Minerva Carter, his wife, to T. J. Carter, C. M. Carter, and J. S. Smith, bearing date October 29, 1870, one of the mesne conveyances through which the appellant derived his alleged title, and in the conveyance from the last-named grantees and their wives to L. F. Grover, of an undivided one-fourth interest in the premises conveyed to them by said Thomas and Minerva Carter, bearing date the third day of November, 1870, another of said mesne conveyances, blocks 1, 12, 13, 14, 11, 2, 36, 33, 34, 35, 39, and 40, also blocks A, B, C, D, and E, all in Carter's Addition to the city of Portland, also a parcel of ground abutting on the south side of blocks 33 and 34, being four hundred and sixty feet in length from east to west, and two hundred and sixty feet wide, were expressly excepted. It appears that the premises in controversy were not within the city of Portland until 1885, when its limits were so

extended as to include them; nor does it appear that the city ever attempted to exercise authority or control over said street at or near said premises until July 20, 1887, at which time the common council of the city adopted an ordinance, that was approved by the mayor on the thirtieth day of July, following, authorizing the respondent, and its assigns, to construct, maintain, and operate a street railway upon and along said street, from the middle line of Market Street southerly to Spring Street, passing over and across the said premises, and under the authority of which ordinance the respondent entered thereon, and did the acts alleged in the appellant's complaint.

The appellant's counsel attempted at the trial to prove damages in consequence of said act above mentioned, and the respondent's counsel, in response thereto, introduced evidence tending to show that the value of the timber in the trestle-work put upon the premises was greater than the amount of the damages claimed by the appellant. This evidence was objected to by appellant's counsel, and its admission by the court excepted to. Several other exceptions were taken by the appellant's counsel to the rulings of the court at the trial, and in charging the jury, which will be kept in view in considering the case. The main question involved is, whether there was a dedication of the premises to the public use as a street.

The plat of 1868 was not acknowledged by Thomas Carter and Minerva Carter, the owners of the tract of land of which the premises are a part, so as to entitle it to record; but it was upon the record, and they referred to it in their deed to Flinn, and thereby recognized it as the plat of Carter's Addition to the city of Portland. I think the jury were justified in finding from the evidence set out in the bill of exceptions that said Thomas Carter and wife caused the plat to be made and recorded. They certainly adopted it as the recorded plat of Carter's Addition, which was an acknowledgment of its reality, and a sanction of its making and recording. The appellant's counsel contends, however, that the making and recording of a plat in such a case must be followed by an acceptance on the part of the public of the streets shown therein, in order to com-

plete the dedication, and he cites a number of cases which hold, in effect, that the laying off of a town, filing and recording the plat thereof, is merely an offer to dedicate the streets shown upon it, which does not become irrevocable until the public have accepted them. This as an abstract proposition of law is correct. But as to what constitutes an acceptance in such a case involves a further inquiry. It will not be contended that any formal acceptance on the part of the public is necessary or even practicable.

When a proprietor lays off a town, makes and publishes a plat of it, showing the blocks, lots, streets, and public squares, and sells to various parties blocks and lots, referring to such plat in describing them, I think the acceptance will be implied. The proprietor in such case deals with the public. In every sale of a lot or a block under such circumstances he gives an assurance that the ground as platted shall remain intact. (*Carter and Mason v. City of Portland*, 4 Or. 339; Angell on Highways, [3d ed.] § 149.) It would be unreasonable and unjust to allow a town proprietor to revoke the dedication of any street indicated upon the plat of the town, for the reason that the corporate authorities of the town had not specially accepted it as a street, nor the public actually entered upon and used it as such. The proprietor proposed to the public in the outset that the ground represented as the street should forever remain open to be used for that purpose, and upon a sale of lots and blocks by reference to such plats he precluded himself from making any other or different disposition of it; at least, that is the doctrine established by this court in *Carter and Mason v. City of Portland*, *supra*, and I see no good reason for departing from it. Laying out a town and recording a plat of it without selling any of the lots would not, in the absence of a statute upon the subject, constitute a dedication of the streets. And if the proprietor, after selling some of the lots, were to change the plat by discontinuing some of the streets, or by establishing new streets to be used instead of the old ones, and the change was acquiesced in for a long time by the purchasers of the lots and the public, it would probably operate as a revocation *pro tanto* of the dedication as originally made.

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The appellant's counsel sought, I apprehend, to apply this latter rule in their case, when they requested the court at the trial to instruct the jury that if they found that the public accepted the use of a road or street, designated as the Terrace Road, alongside of the strip of land claimed to have been dedicated, it was evidence of an acquiescence on the part of the public in the revocation, and declination to accept any other dedication than the one acted upon.

The Terrace Road referred to in the instruction asked seems to have been laid out at the instance of Smith, Grover, C. M. Carter, and T. J. Carter after they had acquired their interests under the deeds of October 29, 1870, and November 3, 1870. It was no doubt expected that it would supersede that part of Fourteenth Street, as designated on the first plat, between Montgomery Street and the point where the Terrace Road turns up the hill, just south of Hall Street. But said parties had no authority to discontinue said Fourteenth Street between said points. The south one half of blocks B and C and blocks 34 and 35, which were expressly excepted out of said deeds, front and abut, as it appears from said first plat, upon nearly all that part of said street. The land adjacent to the premises in controversy, aside from a small portion thereof in front of block 38 on the original plat, was not conveyed to said parties, nor did they own that part of the street, as the excepting of the said blocks out of the said deeds also excepted therefrom the part of said street contiguous to them, it being appurtenant thereto. Under the statute of this State, the land in a street goes to the adjoining lot owners when it is vacated, and I cannot see that the parties referred to had any more right to vacate said part of said Fourteenth Street than a stranger would have had, nor that the use by the public of the Terrace Road would be evidence of a revocation of the dedication of it.

The construction of the law relating to the dedication of land to the public use varies according to the nature and character of the use to which it is to be devoted, and the circumstances under which the dedication is made. The proof of it in some cases must be clear and cogent of an intent to dedicate, as where valu-

able property is claimed to have been given to the public for public use, and no motive shown upon the part of the donor for making the gift. In other cases again, proof of an acceptance of the dedication must be shown by positive acts of its approval, as when it imposes a burden upon those for whose use it was intended. Where, however, a town proprietor lays off his land into town lots, indicates streets upon the plat thereof, and offers the lots for sale, he has a purpose to accomplish by dedicating such streets, and that he intends it to be irrevocable is beyond the possibility of a doubt.

The proprietor expects, and the purchasers of lots understand when they purchase that the streets shown upon the plat will forever remain open to public use. The location of the town site, the number and extent of the streets, and the belief of the purchasers that they will remain permanent and perpetual, are material inducements to the purchase. Nor does the proprietor or the purchasers anticipate that all the streets shown upon the plat will be immediately opened and used. It is generally known and understood that a large portion of them will not be required for use for many years after the town is laid out; that their necessity will depend upon its future development and growth, and that they will remain in abeyance until the public exigency demands that they be opened and improved. Nor does the dedication impose any such burden upon the public as would imply that its acceptance might be refused. Under the system which prevails in this State for the improvement of streets in cities, the lot owners bear the burden of the expense.

The cost of the improvement is assessed upon the lots which front and abut upon the street improved, in proportion to the benefits conferred. The city authorities constitute the governmental machinery by which the cost is assessed and its payment enforced. Neither the general public nor the corporate authorities of the city have any option in the matter. The right to the use of the street inures to the former, and the duty of providing for its use in the manner indicated, and of maintaining it, devolves upon the latter. The whole affair from its inception partakes of both a public and of a private nature. When streets

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in a town have been established in the manner mentioned, and the town becomes incorporated, or subject to the jurisdiction of a municipal government, they will necessarily be under its control. I presume that there is not a city charter in the State but that gives to its officers control of the streets within its limits for the benefit of the public as thoroughfares. That is one of the principal objects for which municipal governments are instituted. The streets are usually established before the government is organized; it finds them as the parties made them; takes control of them under a positive direction of law, and its acceptance of them is really a matter of fiction. The city authorities, under such circumstances, have no alternative but to accept of the streets found to have been dedicated by the town proprietor. But it does not follow that the city is under any obligation to open and improve such streets at once. They may be allowed to remain dormant until their use becomes a public necessity.

The town proprietor ought not to complain on account of such a course. He received a consideration for his dedication of them, was enabled to dispose of lots by means thereof, and understood when he platted the streets, that they would not be opened and improved, or made use of as thoroughfares until the public needed them for that purpose. I can discover no tenable ground upon which Thomas Carter and wife could, if they had retained their interest in the town site, have asked that the street in question be vacated between the points before mentioned. They could not reasonably claim that the public had failed to comply with any condition upon which the dedication was made, nor could they insist that the use of the ground included in the street should revert to them, because the public had not entered upon and used it as such, for they did not understand or expect when they dedicated it that it would be so used until the public necessities should require it; and if Thomas Carter and wife could not, under the circumstances suggested, revoke the dedication, then certainly their grantees cannot do it. If the view I have taken of the questions involved in this case is not correct, it would follow, it seems to me, that a town proprietor of an

unincorporated town could, at any time before the dedication of the streets had been accepted by an entry upon and user of them by the public, revoke it, although he had already sold very many of the lots, describing them by reference to the plat. Such a doctrine would countenance fraud and dishonesty; and a concession to the purchasers of the lots of the right of ingress and egress to and from the lots purchased by them, notwithstanding the revocation, would not extenuate or palliate it. The purchasers of lots in such cases do not understand when they make the purchase that the only benefit they will receive from the streets will be a mere right of way to their lots; they are assured that the streets will remain open for public use, and as the town builds up will be improved, which will add to its importance and to the value of their property.

Many of the courts, in discussing this subject, have made too great an effort to discriminate between such purchasers and the general public. The former are not a distinct class from the latter; they belong to it; are as much a part of the public as those who use the streets for the purposes of travel. If a dozen different persons were to buy lots under the circumstances before alluded to, and impliedly stipulate with the town proprietor that the streets shown upon the plats of the town site should perpetually remain open to public use, they would, so far as I can see, represent the public in the affair as much as a like number of wayfarers would who travel upon such streets, and have equal authority to accept a dedication of them for the public. The acceptance is not supposed to be made by the entire public, it is done by a comparatively few persons who represent it; and a direct agreement made by those who are personally interested in the matter, that the streets shall remain open to public use, ought to constitute as much an acceptance of them by the public, as the using of them by other members of the community would.

The view herein expressed regarding the law of dedication of streets in towns fully sustains the instructions given by the Circuit Court to the jury upon that subject. The instructions were liberal, and as favorable to the appellant as he had a right

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to claim. The view which the appellant's counsel asked that court to adopt, as shown by the instructions which they requested to be given, is entirely too extreme. It attached, under the circumstances of the case, altogether too much importance to the question of *acceptance*. In order to render the dedication effectual, courts must consider the nature of the transaction, and circumstances attending it, in order to ascertain the true intention of the parties, and its legal effect. When a person maps off his land into town lots and streets, and offers his lots for sale by reference to the map, there is no mistaking his intention. He designs, if he is honest, that the streets shall belong to the public, and that they will be accepted and used by it as such, whenever the public necessity or convenience requires it. He does not, of course, anticipate that the various members of the community will rush forward in hot haste to accept his offer; but that its acceptance will abide the course and events of time. The public exigencies requiring the use of the property may not arise for years, but that will not, where he has induced parties to invest in his scheme, release him from the obligation of his agreement. His gift is unconditional, and he can never revoke it without the intervention of circumstances rendering it impossible for it to take effect.

The appellant's counsel insists that the admission of the evidence at the trial as to the value of the structure placed upon the premises in question by the respondent, and that the instruction of the court that such value might be set off against the amount of damages claimed by the appellant, were erroneous. I do not see how the ruling in that particular could injure the appellant, unless he established his right to recover the possession of the premises. But irrespective of that question, it could not have been a material error. It was not, as I view it, technically correct to allow the value of the structure to be set off against the injury to the freehold, yet I think its value should be taken into consideration in assessing the damages. The appellant, if there had been no dedication of the land, would have had a right of action for the respondent's wrongful breaking into the premises, to the extent, at least, of nominal

damages, and he had a right to prove in aggravation of the damages, the acts committed by the respondent while in possession. Those acts consisted in digging holes in the ground and in erecting trestle-work, which by reason of its being a fixture, became the property of the appellant, and the timbers of which were valuable. In consequence of these acts the appellant gained title to the timbers. To ascertain, therefore, how much the appellant was damaged in consequence of digging the holes and erecting the trestle-work, the value of it to the appellant, as merchandise, should be taken into consideration. If A were to wrongfully enter upon B's land, and dig thereon a foundation and build a valuable house, the latter should not be entitled to recover against the former damages for the digging without regard to the value of the structure. The question in such a case is, how much the subsequent acts have aggravated the damages, and if, instead of being an injury they are a positive benefit, he should not be allowed to recover on account of them. Under this view the said evidence was properly admitted, and the instruction in the main was correct.

The appellant's counsel also claims, that in a dedication the legal title remains in the party making it, and that the rights of a party claiming under the dedication are equitable rights only, and cannot be set up in an action at law as against the legal title. A common-law dedication does not pass the legal title to the property dedicated, it merely transfers the use; but that is sufficient, under our statute, to defeat an action to recover the possession of the property, when the possession is consistent with the object and purpose of the dedication.

The judgment appealed from must be affirmed.

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[Filed November 5, 1888.]

DRUCK, RESPONDENT, v. NICOLAI, APPELLANT.

COUNTER-CLAIM.—While a party may know that the defendant intends to set up a claim against his demand and speak of the fact, and indicate a purpose to provide against it, such statement does not concede the right of the adversary, or tend to recognize the validity of his claim.

AN INSTRUCTION.—“Before you can find for the defendant you must be first satisfied that a warranty was made,” is not error.

APPEAL from Multnomah County.

P. L. Willis, for Respondent.

E. Mendenhall, and *A. F. Sears*, for Appellant.

LORD, J.—This is an action to recover the sum of three hundred and forty-one dollars, with interest and attorneys' fees, founded upon a promissory note made by the defendant to the plaintiff. The answer admits the execution of the note, but alleges that it was given to secure the purchase price of an engine and shaft sold by the plaintiff to the defendant, which the plaintiff warranted would accomplish certain results, and to be worth the sum specified in the note; that the shaft was valueless and the engine was worth only two hundred dollars, and that upon discovering the defects the defendant offered to return the shaft to plaintiff and to pay for the engine, or that plaintiff would replace the shaft and defendant would pay the note. For a further defense, the defendant pleaded the same facts and alleged a warranty, and claimed a large amount of damages by way of counter-claim.

The cause was put in issue by the reply, and upon the trial before a jury the plaintiff had judgment for the amount of the note and interest, from which the defendant has appealed to this court, and has assigned several errors upon which he relies for a reversal of the judgment. The first exception is to the refusal of the court to require the plaintiff, as a witness, to answer whether or not he wanted to buy a note against the defendant to set it off against the damages set up by Nicolai in his answer. It is claimed that the statement contained an admission of a fact

which tended to recognize the validity and existence of the claim or set-off, upon which the plaintiff relies to make out his case. As counsel for the plaintiff say, all that can be implied in the event the question was answered in the affirmative is that the plaintiff then knew that Nicolai, the defendant, would set up the claim which he afterwards did in this case; but whether or not the plaintiff learned this before the defendant filed his answer herein, and that he would so claim in either case, is not apparent or of much consequence. While the plaintiff may have known the defendant intended to set up such a claim accordingly as stated, it by no means followed that he admitted or intended to recognize that his adversary had any claim against him. To state what one may know an adversary intends to do, or has done, and the precautions he may choose to pursue in respect to it, does not suggest that he admits or concedes the right of his adversary. It does not concede the fact or matter upon which the party relies to establish his case. The rule that the admissions of a party are admissible when they afford any presumption against him is not denied, as where the defendant admitted to the officer that the amount upon which he was sued was correct, although it was not shown to him, yet it was held admissible as evidence to go to the jury, for the reason that such admission, although it did not have the effect to establish the amount that was due, yet it necessarily implied or operated to show that something was due. (*Sugar & Bro. v. Sackett*, 13 Ga. 462.)

There are two other exceptions to the evidence, one of which need not be considered, as the ground of the exceptions is not disclosed, and in the other the objection is not specific, and in any view could have worked no prejudice. The last exception is to that part of the charge in which the court below instructed the jury that: "Before you can find for the defendant you must first be satisfied that a warranty was made." It is insisted that the word "satisfied" means "free from doubt," and that the instruction in such sense is misleading in requiring the jury to be satisfied beyond a doubt before they can find the existence of the warranty; whereas in civil actions the rule is, and the court

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should have so instructed, that a preponderance of evidence would be sufficient to produce the result; in a word, that the court told the jury in effect that you must be satisfied beyond a doubt, when it should have instructed them, that they must be satisfied by a preponderance of the evidence, etc.

The error in this particular is based on the assumption that the court neglected to give the jury the usual preliminary instruction to guide them in the discharge of their duties. Such as, that the jury is the judge of the credibility of the witness, the weight of the evidence, and that in a civil action a preponderance of evidence should affect the balance, etc. Now, this record does not disclose that the court did not instruct them in this regard, and we would hardly be justified in assuming it neglected so important and essential requirement in the discharge of its duties. If the court in giving its instructions stated to the jury, as we know is usually done, the rule as to the preponderance of evidence, it will hardly be contended that it was error because it was not repeated after the word "satisfied," and before we ought to be called upon to consider the sufficiency of this exception, the transcript ought to negative that fact. In respect to instructions upon such matters as are usually given, and in fact are preliminarily a requirement to qualify the jury for an intelligent discharge of their duty before they come to consider the evidence, the record ought to disclose affirmatively they were not given. Besides, we think, as was said in *Cregler v. Durham*, 9 Ind. 377, in which the same objection was made to an instruction, "had the counsel asked a qualification, such as they now contend for, it doubtless would have been given, but would have worked no change in the result of the trial."

The judgment of the court below will be affirmed.

Points decided.

[Filed November 5, 1888.]

AUGUST ANDERSON, RESPONDENT, v. NELSON BENNETT, APPELLANT.

THE GENERAL DOCTRINE THAT A MASTER IS NOT LIABLE for injuries caused by the negligence of a fellow-servant in the same common employment is now regarded as settled law. The reason assigned for this exemption is that by his contract of employment the servant assumes the risks incident to it, and that both he and his employer had them in contemplation in fixing the compensation.

THE GENERAL RULE AS DECLARED in *Farwell v. Railroad Co.* that all servants employed by the same master, and working under the same control and in a common employment, are fellow-servants, has been the subject of much dispute as to its proper limitations, and in many of the States has been relaxed and modified in consequence of the hardships and injustice growing out of its too general application.

SO THAT, the later current of judicial decision, as well as legislative action, indicates a marked departure from that rule, and a disposition to so limit and restrict it as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment.

A MARKED CHANGE FROM THE OLD RULE is taking place in the law as to servants clothed with partial authority, only such as a foreman or superior servants, and the principle upon which such change is based is that when a master delegates any duty which he owes to his servants, he is liable for its proper performance.

GUIDED BY THIS PRINCIPLE, several tests have been applied in determining the line of demarkation between the representative of the master and the mere servant, and among them is the ruling that the master is chargeable for any act of negligence in so far as the servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing a reasonable safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils, which may be guarded against by proper diligence, etc., and to the extent of the discharge of these duties which the master owes to his servant by the middle-man or vice-principal, the latter stands in the place of the master.

IT IS THEREFORE A DUTY which the master owes to every servant to provide a reasonably safe place at which to work, having reference to the nature of the undertaking, or the exigency of the situation, and although he is not an insurer he is bound on the same principle by the law to exercise due and proper care in this regard, as he is in hiring competent servants, or in supplying reasonably safe machinery or other appliances for the use of his servants.

AS THE DEFENDANT WAS NOT PERSONALLY PRESENT and did not promulgate or establish any suitable or needful rules and regulations for the safe and proper conduct of the work, and as the direct management or execution of the work during his term was placed in charge of C., there necessarily devolved upon him the duties in this particular which the defendant owed to his servants; and as a consequence, it became the duty of C. to provide for the safety of the servants under his control and subject to his commands, by the exercise of such care in the management and conduct of the undertaking intrusted to him, as would render reasonably safe the place at which the employees must apply the machinery and do their work.

16	515
19	527
21	148
21	451
19*	765
25*	369
27*	98
23*	497

16	515
25	294
19*	765
25*	654

16	515
34	251
34	259
34	360
34	265

16	515
40	441
16	515
45	481

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C. WAS THUS NOT ONLY THE FOREMAN to direct the work of the hands under him, but the person above all others to provide that they should have a reasonably safe place at which to work, consistent with the exigencies of the situation, and in this view it is of no importance by what name C. be called, whether a middleman, superintendent, or foreman.

WHEN, THEREFORE, C. ordered the plaintiff to set up the machinery and drill holes at the place where the injury occurred, without having taken any care, or at least, adopted some precautionary measures to discover whether there were holes charged with giant powder which had failed to explode, and to guard against the danger of the drills penetrating them, etc., he committed a negligent or wrongful act, and exposed the plaintiff to a serious danger not contemplated by his contract of service.

APPEAL from Multnomah County.

George W. Yocum, and F. Clarno, for Respondent.

H. Y. Thompson, and George H. Williams, for Appellant.

LORD, J.—This is an action to recover damages for personal injuries caused by the alleged negligence of the defendant's two servants and agents. The complaint in effect is that the defendant was engaged in constructing the tunnel on the line of the Northern Pacific R. R. Co., and that the plaintiff was engaged in his service for hire as a common laborer during the time therein mentioned; that Thomas Cosgrove was the foreman, manager, and superintendent of said work, and that plaintiff was directed under his control and authority, and that by reason of his negligence he was greatly injured and his eyesight destroyed.

The substance of the evidence is that the defendant was a contractor for the construction of a tunnel for the Northern Pacific R. R. Co., and that S. J. Bennett was his chief superintendent and M. B. Turner was his assistant at the west end of the tunnel where the plaintiff was engaged at work, and that Cosgrove was the foreman of the gang or shift of men to which the plaintiff belonged; that in the prosecution of this work there were two shifts or gangs of men working alternately by day and night; that in performing this work, they would clear up so much of the broken rock and debris as would make a clean place for them to operate their drills, which bored holes horizontally and perpendicularly in the benches of the tunnel, then charge them with giant powder and explode it, when that gang or shift would

retire, to be succeeded by the other, who would go through in their turn a like routine of labor; that the materials and appliances for doing the work was furnished by Bennett, the superintendent; that Cosgrove was a man of skill and experience in the business of tunneling, and that in the management of the work of blasting during his term, he acted upon his own judgment, directed and controlled the use of the explosives as well as the use and location of the machinery and drills, commanded the movements of the men under his control, and ordered them when and where and what to do, and how to do it; that he had hired and discharged men under his control, although his authority to do so was denied and contradicted, but not the fact that he had done so; that on the day of the accident the plaintiff was ordered by Cosgrove to drill a perpendicular hole in a certain rock in the tunnel, and that Cosgrove placed the drill on the spot, and ordered and directed the plaintiff to drill the hole, which he was engaged in doing when the explosion occurred that caused the injury; that the injury was occasioned by his boring into a missed or unexploded hole, which was not discoverable by reason of the neglect of the foreman to remove the debris and broken rock.

In respect to this point one witness testified, "that until a good deal of work in cleaning up had been done, that it was impossible for any one to tell whether there was any missed or unexploded holes; that they did not work long in cleaning up before they started drilling; that the missed hole which exploded and done the injury to the plaintiff was covered up with loose rock, and no one could see whether there were any missed holes or not." And again: "There was no chance to examine for missed holes until the rock was cleaned off; nobody could tell there was any missed holes because there was so much rock and debris." And when the inquiry was made why it was not cleared off so as to find out whether there were any missed or unexploded holes, the witness answered: "Because we did not have time. The foreman would not give us time, he was pushing us ahead all the time, hurrying us up." This evidence in substance is fully corroborated by others.

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It is further testified to "that the first thing we did when we got in was to clean off the benches and get ready for drilling;" that before putting the drills to boring it was necessary to have a clean place, and as soon as this was done the drilling began. As to the condition of the tunnel, Cosgrove testifies when he went in that "he looked the tunnel over to see if it was safe—supposed it was safe—that the lower part you could not tell anything about it, as it was all covered with rock." He further testified that "there was a rule for the men to look after missed holes and to report them to him," and the evidence shows that the plaintiff complied with this regulation. In this particular it may be well to note to what he testifies: "When I was drilling the first hole I discovered an unexploded hole and called the foreman's attention to it. This hole I discovered was about ten or twelve inches from the hole I was drilling, may be a little one side. I asked the foreman if he thought there was any danger for me to work in that place. He told me there was no danger, 'go ahead and work.' When the hole was finished I called the foreman's attention again, and asked him in what place he wanted me to drill the next hole, and the foreman took hold of the drill with his hand and set the hole in a perpendicular place and ordered me to drill. This was from four to five feet from the hole I had just drilled. I was drilling a perpendicular hole. When I had drilled only a short time in that place the explosion happened." And he testifies, "that the reason of the explosion was that there was a hole that failed to explode underneath the hole that the foreman had ordered me to drill, and as soon as a part of the drill struck the powder it exploded. That explosion destroyed my eye-sight."

The evidence also shows that the men were put to work cleaning away the debris in the first instance only for the purpose to get a clean place so as to operate the drills, and that when this was accomplished, the drills were set agoing; that with the exception of the rule already referred to, there was no other rule or regulation or instructions devised to protect or provide for the safety of the men in the course of their employment, or requiring the broken rock and loose dirt to be cleaned off so as

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to discover and expose the unexploded holes before the process of drilling began.

Some idea of the force of the explosion, and the danger arising from unexploded holes, unless proper precautions are taken to discover them, is shown by the evidence when it resulted in the killing of four men outright, and seriously wounded and maimed some six or seven others of the gang. Upon substantially this state of facts the court, after giving the usual preliminary instructions to guide the jury in weighing the evidence, etc., charged them that "it was a settled rule of law that a master was not liable to his servant for injuries caused by the negligence of a fellow-servant, and if they found Cosgrove was such, their verdict must be for the defendant; that the term 'fellow-servant,' as a general rule, includes all who serve the same master, work under the same control, and derive compensation and authority from the same source, and are engaged in the same general employment, etc.; that where a master submits the substantial control of the business, or a particular department thereof, to another, giving to such party the power to select his associates, and to discharge them, and full authority to command the laborers over whom he is placed, and direct when and where and how they shall work, the party so invested with authority, although himself a servant, is not a fellow-servant of the laborers thus placed under his control, but that such party stands in the relation of vice-principal, and the master is answerable for his negligence." Then directing his instructions more particularly to the facts of the case in hand, said: "If the jury find from the evidence in this case that Cosgrove was at the time of the explosion described in the complaint charged and intrusted by the defendant with the control and management of the blasting, and the using of high explosives in the Cascades tunnel, and had authority to choose and discharge the men employed in the work, and to command and direct when, where, and how the men should work, and that in pursuance of such charge and trust Cosgrove was exercising authority over the plaintiff as one of the employees of the defendant, so that he could and did rightfully order and direct plaintiff when, how,

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and where he should work, and with what tools and appliances he should work, then Cosgrove is not to be deemed a fellow-servant of the plaintiff; but in respect to this business he should be deemed as in place of the master, and Cosgrove's negligence, if he was negligent, should be deemed the negligence of the defendant. If, on the other hand, the jury find from the evidence that Cosgrove's position and authority at the time of the explosion were those simply of a foreman of a gang or shift of men, having only authority in the direction of the work of such gang or shift, then he is a fellow-servant with the plaintiff, and the defendant is not liable." It is sufficient to say that the trial resulted in a verdict and judgment for the plaintiff, from which the defendant has brought this appeal.

The contention of counsel in this case may be thus summarized: Unless Cosgrove was the fellow-servant of the other servants under his direction and control, or the instruction last referred to incorrectly defines a vice-principal or representative of the master as applicable to the facts, there is no error in the record, and we must affirm this judgment. The general doctrine that a master is not liable for the injuries caused by the negligence of a fellow-servant engaged in the same common employment is now regarded as part of the common law of this land. The reason commonly assigned for this exemption is, that by his contract of employment, the servant assumes the risks incident to it, and that both he and his master had them in contemplation in fixing the compensation. Hence it is said: "He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid." (*Railroad Co. v. Ross*, 112 U. S. 383.) But what are the natural and ordinary risks incident to his employment, and which are supposed to have been adjusted in the stipulated compensation, and who within the principle of the rule are to be deemed fellow-servants engaged in a common employment, are questions often difficult to determine, and in respect to which the adjudged cases are so conflicting that it is impossible to reconcile them. Each case in a great measure seems to be determined by the peculiar circumstances which surround it.

Although *Murray v. Railroad Co.* 1 McMull. 358, was decided prior to *Farwell v. Railroad Co.* 4 Met. 49, yet the latter has been usually regarded as the leading case in which the doctrine of fellow-servants was first clearly enunciated, and its principles engrafted into our law. The rule as there stated by the eminent judge who delivered the opinion is to the effect that all servants of the same master whose labors tend to the accomplishment of the same general purpose, and engaged in a common employment, are fellow-servants, irrespective of their relative grade or rank. The rule as thus declared was generally accepted by the courts of the country as a correct exposition of the law, and it has been approved and adopted by the highest court in England. Within the principle of that rule, all servants, no matter what position they occupied toward each other, or how different and separated the departments of duty in which they were employed, whether operating a mine, or factory, or railway, were deemed to be fellow-servants.

In *Albro v. Agawam Canal*, 60 Cush. 75, the court held that a superintendent to whom the master had intrusted the entire charge of a factory, with the authority to hire and discharge the operatives, was a fellow-servant with one of such operatives. This view has been stoutly adhered to in Massachusetts ever since (*Holden v. Railroad Co.* 129 Mass. 268), and perhaps is still maintained in Pennsylvania. (*Coal Co. v. Jones*, 86 Pa. St. 438.) It seems to ignore the generally accepted idea of vice-principalship as it prevails in some of the other States, and treats all servants under the same control, who serve the same master, as fellow-servants, notwithstanding one may stand in the master's place in relation to the other. And in Great Britain, until abrogated by the Employer's Liability Act, the same principle was the settled law as declared by the highest judicial tribunal in that kingdom. (*Toilser v. Merry*, 1 H. L. Cas. 326.) This is specifically stated by Lord Blackburn in his comments upon that case, in which he said: "But the decision of the House of Lords is distinct, at least, so far as this, that the fact that the servant held the position of vice-principal does not affect the non-liability of the master for his negligence

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as regards a fellow-servant. (*Howell v. Steel Co.* 10 Q. B. 62.) But in the progress of society since the decision in *Farwell v. Railroad Co. supra*, such has been the increase in the number and magnitude of the business operations of the country, the great army of servants required to be employed to perform their work, and the necessity of placing over them, and in charge of these vast operations, other servants to direct and control their labor, that there has been wrought in the judicial mind the conviction that the general application of that rule in such cases has often worked manifest injustice and hardship. So that the later current of judicial decision, and it may be added of legislative action, indicates a marked departure from that rule, and a disposition to so limit and restrict it as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment. And although it may be said that the weight of adjudged cases is, that the relative grade or rank of the servant does not alter the relation of fellow-servants, yet this principle has not always commanded universal recognition, but it has been criticised and denied, and a contrary view asserted by the courts of several of the States, and at least materially limited if not recognized and adopted by the Supreme Court of the United States.

In *Railroad Co. v. Kearney*, 3 Ohio St. 201, the court say: "No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over another." In *Darrigan v. Railroad Co.* 52 Conn. 185, Carpenter, J., said: "To make no discrimination, but in all cases to place those invested with authority to direct and control on the same footing with those whose duty it is merely to perform, as directed, without discretion and without responsibility, seems to us unwise and impolitic." (*Railroad Co. v. Bowles*, 9 Heisk. 866; *Cowles v. Railroad Co.* 84 N. C. 309; *Moon v. Railroad Co.* 78 Va. 745; *Railroad Co. v. May*, 108 Ill. 288; *Railroad Co. v. Lundstrom*, 16 Neb. 261; *Railroad Co. v. Collins*, 2 Duval, 114; *Creswell v. Railroad Co.* 30 W. Va. 38.) 1 Redfield on Railroads, page 529, n., in which the learned author says: "We would be content to treat all subordinates who are

under the control of a superior as entitled to hold such superior as representing the master.”

In *Railroad Co. v. Ross*, 112 N. H. 377, the court below had ruled in effect that in the operation of a train, the relation of superior and inferior was created between the conductor and engineer, and therefore within the reason of the rule they are not fellow-servants, and in affirming this ruling Mr. Justice Field said: “There is, in our opinion, a clear distinction to be made in their relation to their common principle, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department in which their duty is entirely that of supervision and direction. A conductor having the entire charge or management of a railway train occupies a very different position from the brakeman and porters, and other subordinates employed. He is, in fact, and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. . . . The conductor of a railroad train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore, that for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.” These and other references might be made to show the extent to which the rule has been relaxed and modified in several of the States, as well as the dispute which exists as to the proper limitations. Nor can there be any doubt, but that a decided change is taking place from the old rule as to servants clothed with partial authority only, such as a foreman or upper servant, which consider such as fellow-servants with those under their control and subject to their orders, and for whose negligent acts the master was not liable.

A principle upon which a change in the law is based is that when the master delegates any duty which he owes to his serv-

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ants, he is liable for its proper performance. One way of applying it in determining the line of demarkation between the middle-man or mere servant, is to ascertain whether the master has conferred on the foreman or superior servant the authority to employ and discharge the servants under his control. By some courts this seems to be regarded as a decisive test, while others consider it only as an element, although an important one in determining that question. Another way is by considering the master liable if the negligent servant is in charge of or vested with the discretion to control and manage a branch or department of the master's business. But this must be understood to mean something more than the mere right to oversee hands or direct their labors, something more than higher wages or general superiority in position, or in skill or intelligence. Another way of testing is by holding that it is a personal or absolute obligation or duty which the master owes the servant to provide proper instrumentalities, etc., for the conduct of his business, and if he intrusts this duty to his servant instead of discharging it himself, such servant is not a fellow-servant within the meaning of the rule of liability for negligence, and the master is liable for its performance.

In *Shearman and Redfield on Negligence*, section 102, the law is thus stated: "One to whom an employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal could himself, is not a fellow-servant with those employed under him, and the master is answerable to all under-servants for his negligence, either in his personal conduct within the scope of his employment, or in his selection of servants. Mr. Beach thinks the better rule, and the one more consonant with justice and right reason, has been well stated by McIver, J., in *Gunter v. Manuf. Co.* 18 S. C. 362, in this language: "The test as to whether an employer is the representative of the master, is not whether such employee has power to employ and discharge hands, or to purchase or change machinery, for which there are some of the duties of the master, they are not all his duties, and hence an employee who is not intrusted with either

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of these powers may still be the representative of the master. The true test is *whether the person in question is employed to do any of the duties of the master*; if so, he cannot be regarded as a fellow-servant, but is the representative of the master, and any negligence on his part in the performance of the duty thus delegated to him must be regarded as the negligence of the master." (Beach on Contributory Negligence, §§ 110, 115.) "When the master," says Mr. Wood, "delegates complete control over the business, or over any department thereof, to another, the person standing in his place is not regarded as a fellow-servant, but rather as a vice-principal. In such case the person to whom such power is delegated stands in the place of, and represents the master, and all acts or omissions *in respect to the matters in which he acts in the place of the master* in performing the master's duty to the servant are the acts or omissions of the master himself." (Wood on Master and Servant, § 436.) And he further says: "The rule established and supported by the better class of cases is, that whenever the master delegates to another the performance of a duty to his servant which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of those duties of the middleman he stands in the place of the master, but as to all other matters he is a mere co-servant." (Wood on Master and Servant, § 437, and n. 3.)

It is thus seen, whatever diversity of opinion exists in the judicial mind as to the proper qualifications or limitations of the rule, the cases agree that the master is under no personal obligation to give his personal superintendence to the execution of the work, but that he may delegate that power, or any of the duties, to a superintendent or foreman. The question which most frequently arises, and often the most difficult of solution, is in respect to a foreman, and the relation upon the facts in which he stands to the other servants. It is no doubt true, as Mr. Thompson says, that a *mere foreman* of work is generally regarded as a fellow-servant under the rule; but if the master has delegated to

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him or to a superintendent the control and management of the business, or some department thereof, then the rule may be different. And he says: "A true expression of the rule seems to be, that in order to charge the master, the superior servant must so far stand in the place of the master as to be charged with the duties toward the inferior servant, which, under the law, the master owes to such servant." (2 Thompson on Negligence, p. 1028.)

A foreman ordinarily works hand to hand with his co-servants, and does not have the entire charge and control of the business, or any division thereof; he does not act upon his own judgment, but is generally subject to the orders and control of a superintendent; his duties do not exceed mere direction of his co-servants, and do not include the power to hire or discharge hands, or the performance of duties which belong to the master himself. (*Indiana Car Co. v. Parker*, 100 Ind. 181; *Brick v. Railroad Co.* 98 N. Y. 211; *Doughty v. Penobscot Co.* 76 Me. 143; *State v. Malster*, 57 Ind. 287.) Now the main contention of counsel for the defendant is, that Cosgrove was a fellow-servant with those under his control, and not a vice-principal, whom he argues to create, the master must have committed to him the entire charge of the business, with full powers to select servants and discharge them, purchase materials and appliances, and do all things as fully and freely as he could himself in the management of the business. On the other hand, the contention of counsel for the plaintiff is that the master had committed to Cosgrove a distinct portion of the work, and devolved upon him the control and management of it, and the method of its execution, with power to direct the men, and enforce obedience to his orders in the prosecution of their work, which involved the performance of some duties that the master owes to the servant, and which, if he intrusts or delegates them to another, he is answerable for the manner in which they are discharged.

Tested by the rule as laid down by some text-writers, and sustained by a number of respectable authorities, Cosgrove was a fellow-servant, and not a representative of the master. He did not have delegated to him the entire charge of the business,

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or any department thereof, so exclusive in its character that the master deprived himself of all authority or supervision in respect to it. Under that rule, although Cosgrove might be charged with the performance of some duty which the master owes to his servant, yet if he has not delegated to him all the master's powers and duties, surrendered to him the exclusive control and management of the enterprise or business, without reserving to himself any discretion or authority in the matter, he would be regarded as a servant in a common employment with those under him, and therefore a fellow-servant. "The true rule is," said Church, C. J., "to hold the master liable for negligence or want of proper care in respect to such duties as he is required to perform and discharge as master and principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the master, and the latter should be deemed present, and consequently liable for the manner in which they are performed." (*Flike v. Railroad Co.* 53 N. Y. 553.)

The same principle was again declared in *Fuller v. Jewitt*, 80 N. Y. 46, in which it was held that an act or duty which the master, as such, is bound to perform for the safety and protection of his employees cannot be delegated so as to relieve him from liability to a servant injured by its omission, or its negligent performance, whether the nonfeasance or misfeasance be that of a superior or inferior officer, agent, or servant, to whom the doing of the act or the performance of the duty has been committed. "In either case, in respect to such act or duty," said the court, "the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury."

The conclusion to be deduced from these and other authorities to which reference might be made is, that the master is chargeable for any act of negligence, in so far as such servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and appliances, the providing of a reasonable safe place in which to work, and the observance of such care as will not

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expose the servant to hazards and perils, which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servants by the middle-man or vice-principal, the latter stands in the place of the master. In this place there is no complaint that the defendant, as master, did not select competent servants, or that he retained incompetent ones, nor failed to supply suitable instruments with which to do the work; but the grievance of which the plaintiff complains is that he, or that his agent Cosgrove, to whom he committed the execution of the work, failed and neglected to take such precautionary measures for the safety of his servants as he owed to them, and was in duty bound to observe, so as to provide for their safety and for them a place, as reasonably safe, as was consistent with the nature of the undertaking, in which to labor and attend the drills. It is the duty which the master owes to every servant to provide a reasonably safe place in which to work, and although he is not an insurer he is bound on the same principle by the law to exercise due and proper care in this regard, as he is in hiring competent servants, or in supplying reasonably safe machinery or other instrumentalities for the use of his servants.

This is regarded as a personal or absolute obligation. And if the discharge of this obligation is intrusted to a servant, such servant is the representative of the master, and any negligence on his part is the negligence of the master.

The servant has a right to rely on the master's performance of this duty, and his omission to take due care in this respect, whereby injury results to his servant, will be included among the risks which he assumes, and for which he is liable; and while he is not an insurer of their safety, he is not at liberty to neglect all care; he must use due and reasonable care, according to the exigencies of the undertaking. The obligation not to expose the servant to perils which by proper diligence may be guarded against becomes more important, and the degree of diligence and care to be exercised in its performance the greater in proportion to the dangers which may be encountered. (*Houck v. Railway Co.* 100 U. S. 214; *Darrigan v. Railway Co.* 52 Conn.

306.) The duty, therefore, is affirmative and active to take such, or to adopt such precautionary measures as the proper and reasonably safe conduct of the business requires to avoid accident. Now, the evidence shows that the defendant intrusted the work of blasting and using dangerous explosives in charge of Cosgrove, and placed the men under his control, and subject to his orders for the execution of that work. In this respect he exercised supervision over the work, managed and controlled the use of the explosives, directed the place where the machinery and drills should be applied and used, and where and how the men should work.

It appears that after an explosion in the work of blasting the benches and floor of the tunnel would be covered with broken rock and debris, and that the work of the shift or gang of men that came on was to clean out the debris, drill holes, charge them with giant powder, and explode it, etc.; that if any holes thus charged failed to explode, it was impossible to discover and locate them until such broken rock and debris had been removed, and that if the drills with the force applied to them should penetrate any of such unexploded holes, it would cause an untimely explosion, and necessarily occasion great injury to the men, and probably a great loss of life. Under these circumstances it was plainly a duty, and absolutely essential to avoid exposing the men to unreasonable risks in the course of the work in which they were engaged, that so much of the rock should be cleaned away before the drilling began as would expose any missed or unexploded holes, or as would enable them to be discovered and located, so that the charge might be withdrawn, or other thing done to render them harmless, and the drilling and other work go on with comparative safety or no other danger than was incident to its precaution. The defendant was not personally present, nor did he promulgate or establish any suitable or needful rules or regulations for the safe and proper conduct of the work; and as the direct management of the work during his turn was placed in charge of Cosgrove, there necessarily devolves upon him the duties in this particular which the defendant owed to his servants. It was, therefore, the plain

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duty of Cosgrove to provide for the safety of the servants under his control and subject to his commands, by the exercise of such care in the management and conduct of the business intrusted to him as would render reasonably safe the place in which the men must apply the machinery and do their work.

There is nothing in the evidence to show that he took any such care, or took any such precautions as the nature of the business and his duty to the servants required. Instead of putting the men at work to clean up the debris and broken rock which covered the benches and floors of the tunnel for the purpose, *first*, of discovering and finding out whether there was any unexploded holes, and uncharging them so that the place in which the men must work with the drills and do other work would be safe from penetrating a magazine in which lie stored and concealed a box of giant powder, he put them to work in cleaning up the debris only for the purpose of getting a clean place to operate the drills, and when this was accomplished, the drills were started at once, without regard to missed holes, or the dangers which lie buried under broken rock beneath their feet, but which would have necessarily been exposed by its removal. "Nobody could tell that there was any missed holes because there was so much rock," and "we had no chance to examine for missed holes until the rock was taken off." "He did not give us time to clean up and see if there were any missed holes," and so on the evidence runs. Had the foreman exercised only reasonable care and diligence, took a precaution that it would seem the plainest dictate of humanity would require for the safety of the men in the work in which they were engaged, the missed hole must have been exposed, and this dreadful death-dealing explosion avoided. Cosgrove himself testifies that "he supposed it was safe; that there was a good deal of broken rock," etc.; but this has reference to when he entered the tunnel with his shift of hands, and when nothing had been done to clear away the debris. There is nothing in the evidence to show that he did anything then or afterwards which would make it as he supposed it was safe. It is the duty of the master not to expose the servant in performing his duties

to hazards or perils which may be guarded against by proper diligence. (*Houck v. Railway Co.* 100 U. S. 213.) He is bound to observe that degree of care which prudence and that exigency of the situation or the nature of the work may require, to furnish reasonably safe instrumentalities or place in which to work to avoid danger.

"Though we have said," justly remarked Baron Alderson, "that a master is not generally responsible to a servant for an injury occasioned by a fellow-servant, while they are acting in a common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servants to unreasonable risks." (*Hutchinson v. Railway Co.* 5 Ex. 348.) "It was held by this court," said Carpenter, J. (*Wilson v. W. L. Co.* 50 Conn. 433), "that a master was bound to provide for his servant a reasonably safe place for his work and reasonably safe appliances. An application of this principle to a railroad would require it to keep its road-bed, rolling stock, and implements in a good and safe condition, to adopt rules and regulations adapted to its business, so as to guard against accidents. In short, all employees shall be vigilant in the use of means and the adoption of measures to make the servants in their employ reasonably safe. To that extent the master assumes the risk." (*Durriگان v. Railroad Co. supra; Railroad Co. v. McKenzie*, 81 Va. 73.) "Indeed," said Mr. Justice Fields, "no duty required for the safety and protection of his servants can be transferred so as to exonerate him from such liability." (*Railroad Co. v. Herbert*, 116 U. S. 646.)

In *Railroad Co. v. Moore*, 29 Kan. 633, the court say: "In all cases at common law a master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work." And again in *Railroad Co. v. Fox*, 31 Kan. 596, it is said: "One of the exceptions to the general rule at common law, that the master is liable to one employee for the negligence of another employee in the same service, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to

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hazards or perils against which he may be guarded by proper diligence on the part of the master. If it were otherwise, the master would be released from all obligation to make reparation to an employee in a subordinate position, for an injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not." And finally, in *Fraker v. Railroad Co.* 32 Minn. 54, the court say: "It is the duty of the master to establish and promulgate suitable and needful regulations for the safe and proper conduct of its business. And there are duties which belong to the master as such, and in the performance of which he is bound to exercise such diligence for the protection of his employees, and if they are performed through an agent of whatever grade, he must be deemed to represent the master, and the latter is accordingly responsible for their negligent performance."

This is the language running all through the authorities upon this subject, and from these and others, to which reference might be made, the principle is fully established that it is the duty of the master, or the person who represents him, to use reasonable care and diligence and make reasonable provision for the servant's safety, and if he fails to do this he is responsible for the injury sustained as the result of his own or the agent's negligence, unless there was contributory negligence. It was, therefore, the duty of the defendant to make such needful rules for the conduct of the work, or take such precaution as would provide for the safety of the men under the direction and control of Cosgrove as would not expose them to unreasonable risks or dangers in the performance of their duties. As a consequence, it was the duty of the defendant to protect them from the dangers of unexploded holes while engaged in their employment, as without such protection they would be constantly liable to imminent perils. As we have shown, if the reasonable precaution had been taken to remove the debris and broken rock, the unexploded hole which occasioned the injury must have been exposed and discovered, and the disastrous explosion avoided; but the defendant made no provision for these matters.

In the execution of the work and the control of the men he

left everything to Cosgrove, and necessarily the adoption of such measures as would protect them while engaged in their work. He was thus not only the foreman to direct the work of the men under him, but the person above all others to provide that they should have a reasonable safe place at which to work, with reference to its risks and exigencies, and consequently it became his duty to be vigilant in the use of such means as would guard them from the dangers of unexploded holes. In this view, it is of no importance by what name Cosgrove be called, whether middle-man, superintendent, or foreman. The truth is, as was said by the Supreme Court of North Carolina, that so variant were the relations between master and servants in different employments, and so close the line of demarkation between co-laborers and middle-men, that each case would have to stand upon its own facts.

We think, therefore, when Cosgrove ordered the plaintiff to set up the machinery, and to drill holes at the place where the injury happened, without having taken some care, or at least taken some precautionary measures to discover whether there were holes which had failed to explode, and to guard against the dangers of the drills penetrating them, he committed a wrongful and negligent act, and exposed the plaintiff to a serious danger not contemplated by his contract of service. In saying this we are not unmindful that the defendant is not an insurer; but we are mindful that he is not at liberty to neglect all care, but that he must use due and reasonable care. As a result we do not think Cosgrove was a fellow-servant, nor that there was error in the instruction.

The judgment must be affirmed.

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[Filed November 13, 1888.]

STATE OF OREGON, RESPONDENT, v. CHEE GONG
AND FONG LONG DICK, APPELLANTS.

WRITTEN DOCUMENTS IN EVIDENCE.—Before written documents can be introduced in evidence against a defendant on trial for crime, which tend to prove his guilt or to cast suspicion upon the good faith of his defense, they must be proved to be his production, or that he personally, or by another, attempted to use them to his advantage. *Held*, therefore, that where C. G. and F. L. D. were on trial charged with the crime of murder, and the trial court ruled that certain papers containing requests to other parties to testify in their behalf were admissible in evidence, upon a showing that the papers had been delivered by some one, it not appearing to whom, to intermediate parties for transmission to the parties upon whom the request was made, and there was no proof of the defendants having prepared the papers, it was error.

EVIDENCE IN A CRIMINAL PROSECUTION.—Evidence of an *alibi* in a criminal prosecution is not such a defense as admits guilt upon the part of the defendant for any purpose; it merely tends to refute the testimony of the prosecution that the defendant did the act charged. It is evidence in the case which the jury are to judge the effect and value of, and the court has no right to comment upon it. *Held*, therefore, where the court instructed the jury upon the trial of two defendants charged with the crime of murder, that an *alibi* was very often resorted to by guilty persons as well as innocent ones, and one in which perjury, mistake, and deception are often committed, that it was error. *Held*, further, that an instruction to the jury that the burden of proof was on the defendant to make out the defense of an *alibi*, the State having first introduced proof and shown that the defendants were present at, and committed the alleged fatal assault, was also error.

APPEAL from the Circuit Court for the county of Multnomah.

H. E. McGinn, for Respondent.

Williams & Wood, and *P. H. D'Arcy*, for Appellants.

THAYER, C. J.—The appellants, with Chung Ling, Yee Long, and Chee Sun, were jointly indicted in the said Circuit Court for the crime of murder. They were charged in the indictment with having, on the sixth day of November, 1887, at said county, purposely, and of deliberate and premeditated malice, killed one Lee Yick. They were tried separately from the other defendants in the indictment, and found guilty of the crime as charged. The said Chung Ling, or Ching Ling, as he seems frequently to have been called, was also tried and convicted. An appeal was, however, taken to this court from the judgment of conviction in his case, and the judgment reversed.

Opinion of the Court—Thayer, C. J.

A report of the case will be found in 16 Or. at page 419, which contains a statement of the facts of the affair. The appellants herein allege a number of grounds of error, which are presented for our consideration, but as many of them go merely to matters of form, we do not deem it necessary to consider them. Two of the grounds of error relate to the admission of testimony concerning certain papers claimed to have been signed by the said Fong Long Dick, and another ground relates to an instruction given by the court to the jury as to the proof of an *alibi*. These are the only grounds we deem necessary to consider.

It appears from the bill of exceptions that the prosecution introduced as a witness a Mr. A. W. Witherell, the deputy sheriff, who testified that he recognized a certain paper shown him; that he got it in jail; that he went down to the jail to let a Chinaman from Astoria see another Chinaman who was in jail; that as the Astoria Chinaman passed by the cell window of a cell in which, it is claimed, the appellants were confined, he saw a paper handed to the Chinaman whom he took into the jail through the bars. As the latter took the paper from the parties in the cell, he saw witness looking at him, and when witness stepped up to take it from him he tore it in two. Witness further testified that the persons inside did not see him when he took the paper from the Chinaman. Counsel for the State then offered the paper in evidence, which was objected to by appellants' counsel as incompetent and immaterial. The court overruled the objection, to which ruling appellants' counsel took an exception.

Upon his cross-examination witness testified that as he was passing along, some one put that paper out of the cell. In answer to the question as to who it was, he stated: "I do not know." He was then asked: "How many persons were in that cell?" to which he answered: "There may have been three or four persons in there, for all I know. I do not know of my own knowledge who was in the cell. It was dark in there."

The following is a copy of the paper as translated by a China witness: "Young Show and Foo Sing; both kind friends; again tell Low Hong, be my friend; Found Deg, witness. Be

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sure testify that I and Lue Hung lived in same room two months. Not say longer. Tell that we are acquaintances. Tell it that time I came back to my room at half past seven or eight o'clock. Be sure and answer."

The translation was then under the ruling of the court given in evidence to the jury. Counsel for the State called as a witness one Johnson, who testified that he knew these Chinamen; that one of them handed him this paper; that the way he received it, it was in a package of cigarettes. The tobacco was taken out, and that was in the same way the tobacco was. The witness was asked which one of the three gave it to him, and replied: "The one down stairs gave it to me. He said that he received it in the way mentioned, and that he did not know the Chinaman's name who gave it to him; that he did not know Ching Ling by name."

The paper was then read to the jury, against the objection of the appellants' counsel, and is as follows: "Mr. Young Suie. Be sure to see me this evening at eight o'clock especially. If you do not come, I will be disappointed; important business. Ching Ling." Witness testified that he did not know Young Suie.

The instruction excepted to and claimed as error was as follows: "Evidence has been introduced on behalf of the defendants to prove an *alibi*; that is, that the defendants were not present at the alleged fatal assault. When this is made out to your satisfaction it is one of the most conclusive defenses that can be set up; in fact, an *alibi* is not only a proper defense, but to an innocent man is almost always an essential defense, and indeed, it may be his only defense. It is a defense, however, that is very often resorted to by guilty persons as well as innocent ones, and one in which perjury, mistake, and deception are often committed. The burden of proof is on the defendants to make out the defense of an *alibi* when so set up by them as a defense, the State having first introduced proof and shown that the defendants were present at, and committed the alleged fatal assault. Therefore, while an *alibi* is a defense that should not be discredited on account of its character, still it devolves upon

the jury the duty of carefully scrutinizing the testimony in such cases, and of exercising unusual care and minuteness in considering it."

The evidence of the contents of the two papers was clearly admissible. The proof that the appellants, or either of them, prepared or delivered the papers to any one was entirely insufficient. It might be conjectured that said Fong Long Dick passed the first one out of the cell to the Astoria Chinaman, but it was not proved that he did so. Before such a paper can be introduced in evidence, it must be shown that it was the production of the party against whom it was offered, or that he delivered it, either in person or by another, for the purpose of being given to the party for whom it was intended. Such evidence in so important an affair must be direct and certain.

In an action for the recovery of a debt of ten dollars, a paper containing an acknowledgment of it would not be admitted as proof against the defendant upon so slight a showing as was made in this case. Counsel for the State claim that the evidence could not have injured the appellants, but I think otherwise, and that it was error to admit it. I think also that the said instruction was not permissible under our Code.

It is not the province of the court to comment upon the evidence addressed to the jury; it can only state to them the matters of law which it thinks necessary for their information in giving their verdict. It is inhibited from presenting to the jury the facts in the case; and is required to inform them that they are the exclusive judges of all questions of fact. (Code, § 200.) The jury, subject to the control of the court in the cases specified in the Code, are the judges of the effect or value of evidence addressed to them, except where it is thereby declared to be conclusive. (Code, § 845.) The evidence of an *alibi* was not a defense, except so far as it controverted the testimony upon the part of the State, tending to show that the appellants were present and participated in the affair charged in the indictment. When proof is given upon the part of the prosecution which goes to show that the defendant did the acts charged against him, he has the right to disprove it, by showing that he

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was at another place at the time of their alleged commission; and it is the exclusive province of the jury to judge of the weight of the testimony introduced for that purpose, as much as of any other testimony in the case. It is, as said by Mr. Bishop, mere ordinary evidence in rebuttal; and any charge to the jury that it is not, as that the law looks with disfavor upon it, or that it should be tested differently from other evidence, is erroneous. (1 Bishop on Criminal Practice [3d ed.], § 106.)

The establishment by the prosecution of a *prima facie* case does not change the burden of proof; that remains with the prosecution to the end, "the jury, to be authorized to convict, being required to take into the account all the evidence on both sides, including the presumptions, and to be affirmatively satisfied from it with the certainty demanded by law of the defendants' guilt." (1 Bishop on Criminal Practice [3d ed.], § 1050.) The prosecution undertakes to prove the defendant guilty beyond a reasonable doubt, not in view alone of the direct testimony adduced by it, but in view of rebutting testimony as well. The State cannot stop after making out a *prima facie* case against the defendant, and require him to prove himself innocent.

There are cases of special defenses which admit guilt, at least for the purposes of the trial; but they arise out of a plea of some special matter, set up by the defendants, such as, a former conviction, pardon, or, under our Code, insanity; but no such results attend a trial upon a mere traverse of the charges contained in the indictment; nor is the burden of proof shifted on the defendant, when he undertakes to refute the testimony on the part of the prosecution tending to sustain them.

The instruction was clearly erroneous, and the judgment of conviction must be reversed and a new trial awarded.

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[Filed December 19, 1888.]

I. W. CASE, RESPONDENT, v. E. A. NOYES, GARNISHEE,
APPELLANT.

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31*	398
16	539
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GARNISHMENT—ALLEGATIONS AND INTERROGATORIES.—Section 164 of Hill's Code requires that plaintiff, after obtaining the order on the garnishee to answer, and before such garnishee is required to appear, or within a time to be specified in the order, shall serve on such garnishee written allegations and interrogatories, and the plaintiff cannot, after such time has expired, file such allegations and interrogatories, nor can the affidavit, used before the judge to obtain the order on the garnishee to answer, be treated as such allegations.

On petition for rehearing. For previous opinion, see page 329.

STRAHAN, J.—(1) A rehearing was allowed for the purpose of further considering the main question decided, as well as the propriety of remanding the cause to enable the plaintiff to apply for leave to amend his proceedings against the garnishee. The cause has been argued on both points, and upon full consideration, we find no cause to change the opinion already filed in the cause. (2) Amendments ought to be liberally allowed in furtherance of justice.

The spirit, if not the letter of the Code, requires this, but in this case there is nothing to amend. No allegations whatever were filed, and in such case it is not perceived how there could be an amendment. Counsel for the respondent insists that the affidavit used before the judge to obtain the order on the garnishee to answer might be treated as *allegations* within the meaning of the Code; but we think otherwise. Such affidavit cannot supply the office of a pleading which the Code expressly requires in this case.

The plaintiff could not now be permitted to file allegations without disregarding the plain requirements of the Code. After the plaintiff obtained his order on the garnishee to answer, and *before* such garnishee was thereby required to appear, or within a time to be specified in the order, the plaintiff was bound to serve on such garnishee, written allegations and interrogatories. (Hill's Code, § 164.) The time fixed for such service has long since elapsed, and it is not perceived on what principle the court could now permit it to be done, and treat such allega-

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tions as an amendment of something that never had any existence. It would be a misnomer to call it an amendment. Instead of an amendment, it would be the making of a new case after the time limited in the statute for that purpose.

We doubt the power of the court by calling the proceeding an amendment, to extend and enlarge the provisions of the Code referred to. Besides this, a garnishee is brought by virtue of the coercive power of the court over his person, and disobedience of the order to appear is punishable as a contempt.

In such case I think the garnishee is in court for the particular purpose specified in the statute, and if the plaintiff would succeed against him he must substantially follow the statutory requirements. I am unable, therefore, to perceive any error in the former opinion, and it must be adhered to.

NOTE.—This opinion in *Miller v. Tobin* was inadvertently omitted from volume 15 Oregon, the opinion on rehearing only being reported on page 595 of that volume.

[Filed November 7, 1887.]

J. F. MILLER, APPELLANT, v. J. TOBIN, RESPONDENT.

PUBLIC LANDS—DONATION OF SWAMP LANDS—CONFLICTING TITLES—REMEDY AT LAW.—The Act of Congress of March 12, 1860, "to extend the provisions of an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, to Oregon and Minnesota," was a grant *in presenti* to the latter States of land that was in fact swamp land at the date of the act; and a party claiming such land under a patent from the State of Oregon has a complete remedy at law against one claiming under a patent from the government; and a suit at equity by the former against the latter to compel the conveyance of the latter's title to the former will, for that reason, be denied.

APPEAL from the Circuit Court of Klamath County.

P. P. Prim, H. K. Hanna, and N. B. Knight, for Plaintiff.

B. F. Dowell, for Defendant.

LORD, C. J.—This is a suit to have the defendant decreed to convey to the plaintiff the legal title to certain land described in

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the complaint, for which he holds a pre-emption patent from the United States, dated October 6, 1875. The plaintiff claims title to the same land under a deed executed by the State of Oregon to him, as swamp land, in pursuance of an act of the legislature, commonly known as the "State Swamp Land Act," of October 26, 1870, upon his compliance, as alleged, with the provisions of that act. The complaint shows that the defendant is in possession of the land in question; that it has not been listed or patented to the State of Oregon by the secretary of the interior, whose duty it is so to do, primarily, under the Act of Congress of March 12, 1860, entitled, "An act to extend the provisions of an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits to Oregon and Minnesota, and for other purposes;" but that the State selected this land, together with other lands, as swamp lands, January 10, 1872; filed a notice of the State's claim, and a list of the selections, including the land in controversy, in the office of the surveyor-general for Oregon, December 1, 1872, and in the United States land office in Klamath County; and all other acts and things as required by the State swamp land act as aforesaid. The plaintiff's deed from the State is dated July 5, 1882. It is also alleged that the said land is swamp; that the defendant well knew it to be such when he settled upon it as land subject to pre-emption, but that he falsely and fraudulently stated that said land was subject to private entry, etc., and procured the affidavits of James Hudson and Dennis Crowley, "that the defendant had resided upon, cultivated, and improved the said described land as by the pre-emption laws of the United States required," which affidavits were false and fraudulent, and well known so to be by the defendant at the time, etc.; "that the register of the United States land office at Linkville, Oregon, relying upon the defendant's statement that said land was subject to private entry, and relying upon the said proof of settlement and improvement of said land, and believing the same to be true, permitted the defendant to enter upon said land, and thereafter to receive the patent therefor, to the great injury of the plaintiff;" "that the plaintiff is the owner of the equitable title to said land, and

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that the defendant ought, in equity, to convey to him the legal title to the same," etc.

As the first and main objection raised and relied upon is, in our judgment, decisive of this case, it is unnecessary to make further reference to the facts in the pleadings. That objection is that the facts stated do not present a case requiring equitable relief, or that the remedy of the plaintiff, if any, is complete at law. This will require some reference to the swamp land act of Congress, which we shall assume to be known without incorporating its provisions here. The swamp land act is a grant *in presenti*, by which the title to such lands passed at once to the State, upon the adoption of the Act of Congress of March 12, 1860, extending the provisions of that act to Oregon. It has been so held by the Supreme Court of the United States (*Railroad v. Smith*, 9 Wall. 95; *French v. Fyan*, 93 U. S. 169; *Martin v. Marks*, 97 U. S. 345), and of this State (*Gaston v. Stott*, 5 Or. 488), and of the several States of the Union. (*Owens v. Jackson*, 9 Cal. 322; *Kernan v. Griffith*, 27 Cal. 87; *White-side Co. v. Burchell*, 31 Ill. 68; *Keller v. Brickey*, 78 Ill. 133; *Fore v. Williams*, 35 Miss. 533; *Fletcher v. Pool*, 20 Ark. 100; *Hendry v. Willis*, 33 Ark. 833; *Allison v. Halfacie*, 11 Iowa, 450; *State v. Bank*, 106 Ind. 436.) This view of the character of the grant has recently been sustained in *Wright v. Roseberry*, 121 U. S. 488; 7 Sup. Ct. Rep. 985, by Mr. Justice Field, giving the opinion of the court, in which he shows, after an able and exhaustive examination, that the construction of the swamp land act as a grant *in presenti* has been maintained by the law officers of the government, by the land department, and by the repeated adjudications of the Supreme Court.

It must be taken, then, as settled law, that the Swamp Land Act of Congress of March 12, 1860, is a grant *in presenti* to the State of Oregon of the lands situated within its limits, of the land described, and that the legal title to such lands is in the State, or its grantees, to whom it has lawfully conveyed them. Nor is this point contested by counsel for the plaintiff. They admit that the swamp land act was a present grant, which passed

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immediately to the State the title to all the swamp lands within its borders; but they claim, under the second section of that act, the identification of such lands as were swamp was confided to the secretary of the interior; and that until he shall make such identification, by the issuance of a patent, the State or its grantees is powerless, in a court of law, to assert title to any of such lands against any person holding a patent to the same from the government of the United States, for the reason that such patent is conclusive of the legal title, and cannot be impeached or avoided by parol testimony in a court of law.

Now, the theory on which the suit is brought is that the legal title to the land in dispute, and alleged to be swamp, is in the defendant Tobin; it asks that he be declared a trustee of the legal title for the plaintiff, and that he be decreed to convey the same to him. This is inconsistent with the view that the swamp land act was a present grant of such lands to the State. Nothing can be plainer, if the land be swamp, as alleged and claimed, than that the title to it, under the act of Congress, is in the State, or the plaintiff as its grantee, and out of the United States, and that the patent to the defendant Tobin is a nullity, and conveyed nothing. Unless the United States has title to the thing granted, its patents can convey no title. Mr. Justice Field said: "It is common knowledge that patents of the United States for lands which they had *previously granted*, reserved for sale or appropriated, are void." (*Wright v. Roseberry, supra.*) It will not do to say, to avoid the effect of the contradiction involved, that the title of the State is incapable of proof until the quality of the land to which it attaches is identified and patented by the secretary; for then a court of equity would be as powerless to furnish relief as a court of law. Besides, that would imply that the secretary could defeat the grant by his failure or negligence to identify and patent the lands granted; and that the State was powerless, either through its legislature or courts, to prevent its rights from being defeated. Nor will it do to say that the secretary may issue a patent for land as a pre-emption claim which had years before been granted to the State as swamp; that such patent is not

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open to collateral attack in an action of ejectment; or that it is conclusive evidence of title in the holder of such patent, as against the State or its grantees, which can only be impeached by a proceeding in equity. Such a patent is absolutely void, and may be collaterally impeached in any action. The conclusive presumptions which attend patents of the United States as conveyances of title is only indulged when the United States has title to the subject-matter conveyed, and its officers authority to execute or issue patents for such land. "If the lands had been previously disposed of," said Mr. Justice Field, "or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department, in that event, would be like the action of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such case the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act. . . . A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department has no jurisdiction to dispose of the lands; that is, that the law does not provide for selling them, or that they had been reserved for sale, or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, but its authority to act at all is denied, and shown to never have existed." (*Smelting v. Kemp*, 104 U. S. 641-646.) When the selections are made, and approved by the secretary, or the patent issued, all the authorities agree that it relates to the date of the grant, and in such case, the patent is evidence of the identification of the land as swamp, and *confirmatory* of the title granted by the act. Its effect is, as Mr. Justice Field said, to "establish definitely the extent and boundaries of the swamp and overflowed lands in any

township, and thus render it *unnecessary* to resort to oral evidence on that subject. . . . The determination of the secretary upon these matters, as shown by the patent, would be conclusive as against any collateral attacks; he being the officer to whose supervision and control the matter is especially confided." (*Wright v. Roseberry*, 121 U. S. 500; 7 Sup. Ct. Rep. 985.) As a consequence, then, it results that it is only when the action of the land department is within the scope of its authority, as in the instance just cited, or in the issuance of a patent for the sale of any of the public lands subject to sale by pre-emption or otherwise, that such a patent is conclusive of the legal title. But this doctrine of the conclusive presumption which attends the patent has no application when the action of the land department is without the scope of its authority or jurisdiction to act, as in the issuance of a patent for lands not subject to sale, reserved, or which have been previously granted away. In such cases, the action of the land department would be like that of any other special tribunal which assumed to act without jurisdiction; the patent, as an attempted conveyance of title, would be inoperative and void, and open to collateral assault in any action.

In this connection, it may perhaps be important to bear in mind the different functions which a patent may perform. Under the swamp land act, the patent is only confirmatory of the title already granted to the State, and, when issued, becomes record evidence of the title, although adding nothing to the title itself. In many other cases, it is a conveyance of title of whatever interest the government has to convey. This distinction is thus stated in *Langdeau v. Hanes*, 21 Wall. 521, in which the court say: "In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary, having the dignity of a record of the existence of that title, or of such equities respecting the claim as to justify its recognition and confirmation." But in either case, whether the patent be a conveyance of title of public land sub-

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ject to sale, or confirmatory of title already passed by act of Congress granting it, the patent derives its conclusive force and effect at law from the fact that the land department acted within the scope of its authority, and had jurisdiction under the law to do what was done.

With this explanation we are now prepared to examine the authorities cited by counsel to sustain the view that the remedy is in equity and not at law.

The case of *Johnson v. Towsley*, 13 Wall. 72, so far as it has any bearing on the matter here involved, only decides that the action of the land office in issuing a patent for any of the public land subject to sale by pre-emption is conclusive of the legal title when its action is within the scope of its authority; that is, when the land office has jurisdiction under the law to convey the land, and the power of equity to interfere when fraud or mistake intervene.

In *Railroad Co. v. Smith*, 9 Wall. 95, the secretary of the interior had not furnished the State of Missouri with any list of its swamp lands, nor had the State received any patent for the same. The question presented was whether the grant by the Act of Congress of June 10, 1852, to Missouri, of lands to aid in the construction of certain railroads, covered the swamp and overflowed lands granted to the State by the Act of September 28, 1850. The defendant Smith, the State's grantee, had been permitted, on the trial below, to introduce evidence, against objection, tending to prove that the lands in suit were wet, and unfit for cultivation, at the date of the Swamp Land Act of 1850. After some reference to the nature of the grant, the duty of the secretary of the interior to identify and ascertain the character of the land, and furnish the State with the evidence of it, the court said: "Must the State lose the land, though clearly swamp land, because the officer had neglected to do this? The right of the State did not depend on his action, but on the act of Congress; and, though the State might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of these lands, the right of the State could not be defeated by that delay." And the court further

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said that, as the secretary had no satisfactory evidence under his control to make out these lists, he must, if he attempted it, rely on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. "Why," asks the court, "should not the same kind of testimony, subject to cross-examination, be competent, when the issue is made in a court of justice to show that they are swamp and overflowed? The matter to be shown is one of observation and examination; and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became, because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose." Note how these facts parallel with the facts stated by the complaint. Although the swamp lands were granted to the State more than a quarter of a century ago, the secretary, upon whom the law primarily devolved the duty, has failed or neglected to identify or ascertain the character of the lands, and furnish the State with the evidence of it. The State, in 1870, passed an act providing for their identification and sale, etc., and the plaintiff holds the State's deed to the lands in question as swamp. As the same reason arises upon the facts in this case as that, in the language of the court, "why should not the same testimony, subject to cross-examination, be competent, when the issue is made in a court of justice, to show that the lands are swamp? The matter to be shown in either case is one of observation and examination; and there is no reason why such evidence should be excluded, and the State's rights embarrassed, by the non-action of the secretary?"

In *French v. Fyan*, 93 U. S. 169, the circumstances under which the parol evidence was admissible to show that the lands claimed were swamp and overflowed was considered by the court, and stated with great precision. That was an action of ejectment for swamp and overflowed lands, and the only question raised related to the refusal of the court below to receive oral testimony to impeach the validity of a patent issued by the United States to the State of Missouri for the land in question, under the Act of 1850, the purpose of the testimony being to

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show that the land in controversy was not, in point of fact, swamp land, within the meaning of that act. The land had been certified in 1854 to the Missouri Pacific Railroad Company as a part of the land granted to aid in the construction of its road by the Act of June 10, 1852, and the plaintiff had become vested with the title of the company. To overcome this title, the defendant gave in evidence the patent to the State, under the swamp land act, under which he claimed by regular conveyances. The plaintiff then offered to prove, by witnesses who had known the character of the land in dispute since 1849, that it was never wet and unfit for cultivation. The court below refused to receive the testimony, and this is assigned as error. The court say: "This court has decided more than once that the swamp land act was a grant *in presenti*, by which the title to those lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage. The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to the act granting lands to the State of Missouri for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State, under the Act of 1850; for while the title under the swamp land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union, when this occurred afterwards, there can be no claim of an earlier date than that of the Act of 1852, two years later, for the inception of the title of the railroad company." As to the admissibility of the parol testimony offered to show that the land in the patent was not swamp land, the court say: "The second section of the swamp land act declares 'that it shall be the duty of the secretary of the interior, as soon as practicable after the passage of this act, to make out accurate lists and plats of the land described as aforesaid, and transmit the same to the governor of the State, and at the request of the governor, cause a patent to be issued to the State there-

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for. . . .’ It was under the power conferred by this section that the patent was issued under which defendant holds the land. We are of opinion that this section devolved upon the secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power of determining what lands were of the description granted by that act, and made his office the tribunal, whose decision on that subject was to be controlling.”

Here the defendant has not only the older and better title on the face of the papers, but he deraigned his title from a patent issued under the swamp land act to the State. No one can deny but what the land department, in issuing that patent to the State, was acting within the scope of its authority; and that the secretary, as the head of it, in ascertaining and identifying the land described in the patent as swamp, was discharging a duty which the law devolved upon him. Parol evidence, therefore, was inadmissible to impeach the patent, but was conclusive of the legal title within the principle decided in *Johnson v. Towseley*, 13 Wall. 72, that “when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others.”

But this gives no support to the theory that the remedy of the plaintiff is in equity, upon the facts presented. Taking these to be true, the point of his contention is that the land in controversy had passed from the United States before the defendant’s patent was issued. The object of parol evidence in his case is to show that the lands were swamp within the Act of 1860; and when that fact is established, it would follow that such land could not be subject to pre-emption, or be public lands at the disposal of the United States. In such case, the judgment of the land department as to matters properly before it is not attacked, but its authority to act at all is denied, and shown never to have existed. And in *French v. Fyan*, the court further remarked, in commenting upon *Railroad v. Smith*, *supra*, upon which reliance was placed for the admission of parol testimony: “The admission was placed expressly upon the grounds that the

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secretary of the interior had neglected or refused to do his duty ; that he had made no selections or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act." "There was no means, as this court has decided, to compel him to act ; and if the party claiming under the State, in that case, could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of practice would occur, and the entire grant of the State might be defeated by this neglect or refusal of the secretary to do his duty."

The result of these two last cases cited, *French v. Fyan* and *Railroad Co. v. Smith*, is thus stated by Mr. Justice Field : "That whenever the secretary of the interior has acted and certified the lists required by the Act of 1850, and issued the patent, his determination is so far conclusive as to the character of the land that it cannot be collaterally attacked. But where he has failed to make such list, and issue the patent, it is competent for the State, or parties claiming from her, to prove, by parol testimony, that the land is of the character mentioned in the Act of 1850 which passed to her." (*Savings Union v. Irwin*, 28 Fed. Rep. 711.) The facts stated by the plaintiff present a case where the secretary has failed to make such a list, and issue the patent ; and under the authority and reasoning of the cases cited, it is competent for the State, or the plaintiff as her grantee, to prove by parol testimony that the land is of the character mentioned in the Swamp Land Act of 1860, which passed to the State. When this fact is established, any subsequent patent of the United States for the same land must be void, and is examinable at law as well as in equity. In *Wright v. Roseberry*, *supra*, which is a more elaborate and authoritative exposition of the law on this subject, the result of these decisions is thus summed up by Mr. Justice Field : "That the grant of 1850 is one *in presenti*, passing the title to the lands as of its date, but requiring the identification of the lands to render the title perfect ; that the action of the secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal, to which the determination of the matter is intrusted.

But, when that officer has neglected or failed to make the identification, it is competent for the grantees of the State to prevent their rights from being defeated, to identify the land in any other appropriate mode which will effect that object."

Like other States in which such swamp lands were situated, the State of Oregon has enacted laws to identify and dispose of them, and for that purpose provided for their survey and sale, and the issue of patents or deeds to the purchasers. Subsequent to the Act of 1850, there has been legislation of Congress designed to remedy or counteract the evils arising from the delay of the secretary, which has recognized the nature of the grant as one *in præsenti*, and the paramount character of the title of the State. The plaintiff is the grantee of the State by deed, and no question is raised as to his deed not having been issued in conformity to the requirements of the act of the legislature for the sale of swamp lands. "The patent of the State," said Mr. Justice Field, "is the conveyance of whatever interest she had at the time in the land; and if it were within the description of swamp and overflowed land, her interest was paramount to that of the United States, unless their title antedates the Act of 1850." (*Savings Union v. Irwin, supra.*) As the State of Oregon derives its title to the swamp lands within its territories from the Act of 1860, if the lands in controversy are within the description of swamp and overflowed land, as alleged, the conveyance of the State passed her title to them to the plaintiff, which is paramount to that of the grantee of the United States, unless the title of such grantee antedates 1860. This is not pretended; the admitted facts are otherwise. In such a case, "where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source, or by a prior conveyance from a common source," the doctrine of the conclusive effect to be given to the action of the land department in the issuance of a patent has no application. "The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had, before the

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initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law, as well as in a suit at equity." (*Wright v. Roseberry, supra*, 519.) Again, in the same case, it is said: "It would be a most extraordinary doctrine if the holder of a conveyance of land from a State were precluded from establishing his title simply because the United States may have subsequently conveyed the land to another, and especially from showing that years before they had granted the property to the State, and thus were without title at the time of their subsequent conveyance. As this court said in *New Orleans v. U. S.* 10 Peters, 662, 731: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of the right in the power which issued it. On its face it is conclusive, and cannot be controverted, but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative." As a consequence, it must result that when the government has no title to the thing granted, or its officers no authority to issue the grant, such grant or patent must be absolutely void; and in such cases, "the validity of the grant," said Chief Justice Marshall, "is examinable at law." (*Polk v. Wendall*, 9 Cranch, 87.)

If anything more could be wanting, the case of *Wright v. Roseberry, supra*, is decisive of the point that the remedy of the plaintiff is complete at law. In that case the action was in ejectment to recover a certain tract of land. It was alleged to be swamp and overflowed land, and the title to it, therefore, passed to the State by the Act of Congress of September 28, 1850. The complaint was in the usual form in such actions. All the defendants denied the allegations in the complaint, and set up other defenses, etc. The plaintiffs asserted title to the premises as swamp and overflowed lands by conveyances from parties who had purchased them from the State. The defendants claimed the premises through patents from the United States, issued under the pre-emption laws, or parties from whom

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they derived their interest. It is sufficient to say that the trial resulted in a judgment for the defendants, which, on appeal to the Supreme Court, was affirmed; that court holding "that because the commissioner of the general land office had not certified the lands in controversy to the State as swamp and overflowed when the action was commenced, in 1870, there was no title in the State by the grant of 1850 which could be enforced; thus making the investiture of title depend upon the act of the commissioner, instead of the act of Congress." For the error in thus holding, Mr. Justice Field said, for the court: "The case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the Swamp Land Act of 1850 took effect. If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the State, and after the segregation map was deposited with the surveyor-general of the State, with notice, also, that they were actually segregated and claimed by the State as such lands." In all substantial particulars, this case is on all fours with the facts of the case in hand, and is decisive that the remedy at law is complete and adequate.

The plaintiff, by deed, which is *prima facie* evidence that the land embraced by it is of the character represented, derives title from the State under the Swamp Land Act of 1860. The secretary of the interior has not certified the lists required by the act, and issued the patent to the State; but the State, in pursuance of legislation, has filed notice of its claim, and the segregation thereof as swamp, including the land in dispute. The defendant claims title by patent from the United States, under the pre-emption laws, upon proceedings subsequent to the Act of 1860. The case of *Wright v. Roseberry*, *supra*, distinctly decides that the issue of patents for lands, under the pre-emption laws, upon claims initiated subsequent to the swamp land grant to the State, is not conclusive at law, as against parties claiming under

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such grant, in an action for their possession. Evidence is admissible to determine whether or not the lands in fact were swamp and overflowed at the date of the swamp land grant, and if proved to be such, the rights of subsequent claimants under other laws are subordinate thereto. (See, also, *Savings Union v. Irwin*, *supra*, 711; *Richter v. Riley*, 22 Cal. 639.) Assuming the facts stated as true, if a court of law is authorized to take cognizance, and it is competent to render a judgment which affords a plain, adequate, and complete remedy, the plaintiff has no ground for equitable interference, and the jurisdiction should be rejected. This is understood to be the undeviating practice of this court, when the objection has been raised at the proper time, and insisted upon, as here. In *Phipps v. Kelley*, 12 Or. 216, it was said: "A strictly legal right, unaffected by any equitable incident, for which there is a legal remedy, adequate and speedy for its enforcement or protection, is not properly a subject-matter under the legitimate province of equity, and of which equity could take cognizance without depriving the defendant of his constitutional rights to a trial by jury. This is a highly valued right, to which the people are attached, or the legal settlement of disputed questions of fact, and which they have secured by constitutional guaranty, to the end that no one should be deprived of it except for proper and specified cause."

The requirements of the law, therefore, make it our duty to affirm the decree dismissing the complaint, and it is so ordered.

STRAHAN, J., concurring.—If the act of Congress extending the swamp land grant to Minnesota and Oregon be a grant *in presenti*, without qualification or reservation, the title to all such lands passed to the State; then, if the plaintiff has that title, his remedy is undoubtedly at law. Any subsequent grant or sale by the government of the same lands would be a nullity; but if the proviso in the act is a limitation upon the granting clause, or in the nature of a reservation, then I am inclined to think that the government was authorized to make sales of swamp lands in Oregon at any time prior to the confirmation of title to

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be made under the authority of said act. And in that view the plaintiff would necessarily be without title, and without remedy, and Tobin's title would be perfect on the admitted facts. But, if my impressions are correct on this point, then the opinion is undoubtedly correct, and the plaintiff's remedy is at law.

A brief reference to the acts of Congress will make clearer the reasons for the doubts entertained. The first section of the Act of September 28, 1850, is as follows: "To enable the State of Arkansas to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands therein, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State." The second section is in these words: "It shall be the duty of the secretary of the interior, as soon as may be practicable after the passage of this act, to make out accurate lists and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and cause a patent to be issued to the State therefor; and *on that patent the fee-simple to said lands shall vest in said State of Arkansas*, subject to the disposal of the legislature thereof. . . ." The first section of the act of Congress extending the provisions of said last-recited act to Minnesota and Oregon is as follows: "That the provisions of an act of Congress, entitled, 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September 28, 1850, be, and the same are hereby extended to Minnesota and Oregon, *provided*, that the grant hereby made shall not include any lands which the government of the United States may have reserved or sold (in pursuance of any law heretofore enacted), prior to the *confirmation of title to be made* under the authority of this act.

This cause has been twice argued, once at the March term, 1886, and again at the succeeding October term; but, owing to the importance of the questions involved, we have thought it best to give them a careful and deliberate examination before announcing our conclusions. A number of very important questions were suggested at the argument, but I do not find it

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necessary to consider but one, and that is the construction and effect of the proviso to the Act of March 12, 1860, as applied to the facts of this case.

The rule of statutory construction is a familiar one, that all acts relating to the same subject are in *pari materia*, and are to be construed as though their several provisions were incorporated together, and constituted one entire act. Equally well settled is another rule of construction, and that is that every word in a statute must be given its proper meaning and effect, if possible. And our Code (§ 684) declares another rule quite as important and salutary, as follows: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and, where there are several provisions or particulars, such construction is, if possible, to be adopted, as will give effect to all." The effect of this proviso was incidentally considered by this court in *Gaston v. Stott*, 5 Or. 48. It is there said: "The exception of any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of the law heretofore enacted) prior to the confirmation of title to be made under authority of said act, is repugnant to the purview of the act, and cannot stand. We cannot bring ourselves to believe that Congress intended to take away any part of the particular lands granted by the body of the act, by the subsequent general words quoted." I cannot assent to this construction. The intention of Congress in making this grant is to be gathered from the language used, from the circumstances attending the enactment, and from contemporaneous history. The operation of no part of the act can be overthrown by conjecture. It is plainly susceptible of such construction, as that the entire act may have effect, and I am wholly unable to perceive that irreconcilable repugnancy which is claimed to exist, and I am therefore unable to yield to the criticism of this court above quoted. The construction claimed for this part of the act expunges it from the act itself, just as effectually as if no such language had ever been used therein. As at present advised, I

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cannot accede to this view. It is a fact fully shown by the reports and decisions of the courts of last resort, in the various States in which large quantities of swamp land were situated, that after the passage of the Act of September 28, 1850, serious conflicts and complications grew out of its execution, and many land titles were consequently left in a state of very great uncertainty. So great had the evil become that Congress was compelled to and did interfere, and passed various confirmatory acts applicable to particular States in favor of the actual settlers on such lands, as well as in favor of the States claiming under the swamp land grant. And whenever Congress did act on this subject, the rights of settlers on such lands were always protected. In many instances, doubtless, the States lost lands to which they were actually entitled under the grant, but it is believed that in every instance when such claim was *bona fide* and just on the part of any State, it was recognized by Congress, and its settlement provided for, sometimes by the selection of other lands in lieu of those taken by settlers, and, in other instances, by turning over to the States the money actually received upon the sale of such lands. It must be observed that the policy was pursued in executing the Act of September 28, 1850, which did not contain the proviso found in the Act of 1860, "An act for the relief of purchasers and locators of swamp and overflowed lands," which may be found in the United States Statutes at Large, volume 10, page 634, is an example of the class of legislation referred to, and is general in its operation.

This act contains but two sections. The first, in effect, provides that, as soon as practicable, the president should cause patents to be issued to the purchasers or locators who had entered public lands, claimed to be swamp lands, either with cash or with land warrants or scrip, prior to the issue of patents to the States, as provided by the second section of the swamp land act, any decision of the secretary of the interior or other officer of the government to the contrary, notwithstanding; except that, in cases of sale by the States before entry under the laws of the United States, no patent should be issued until the State should release; but, if the State omitted for the space of

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ninety days to forward lists of the lands so sold, that then patents should issue as before ordered without delay. The second section provided for indemnity to the State, by ordering that the purchase price, in case of cash sales by the United States, should be paid over to the State, and, in case of sales for warrants or scrip, that the State should have other lands to be selected by it from any of the public lands subject to entry, and for which it should receive a patent.

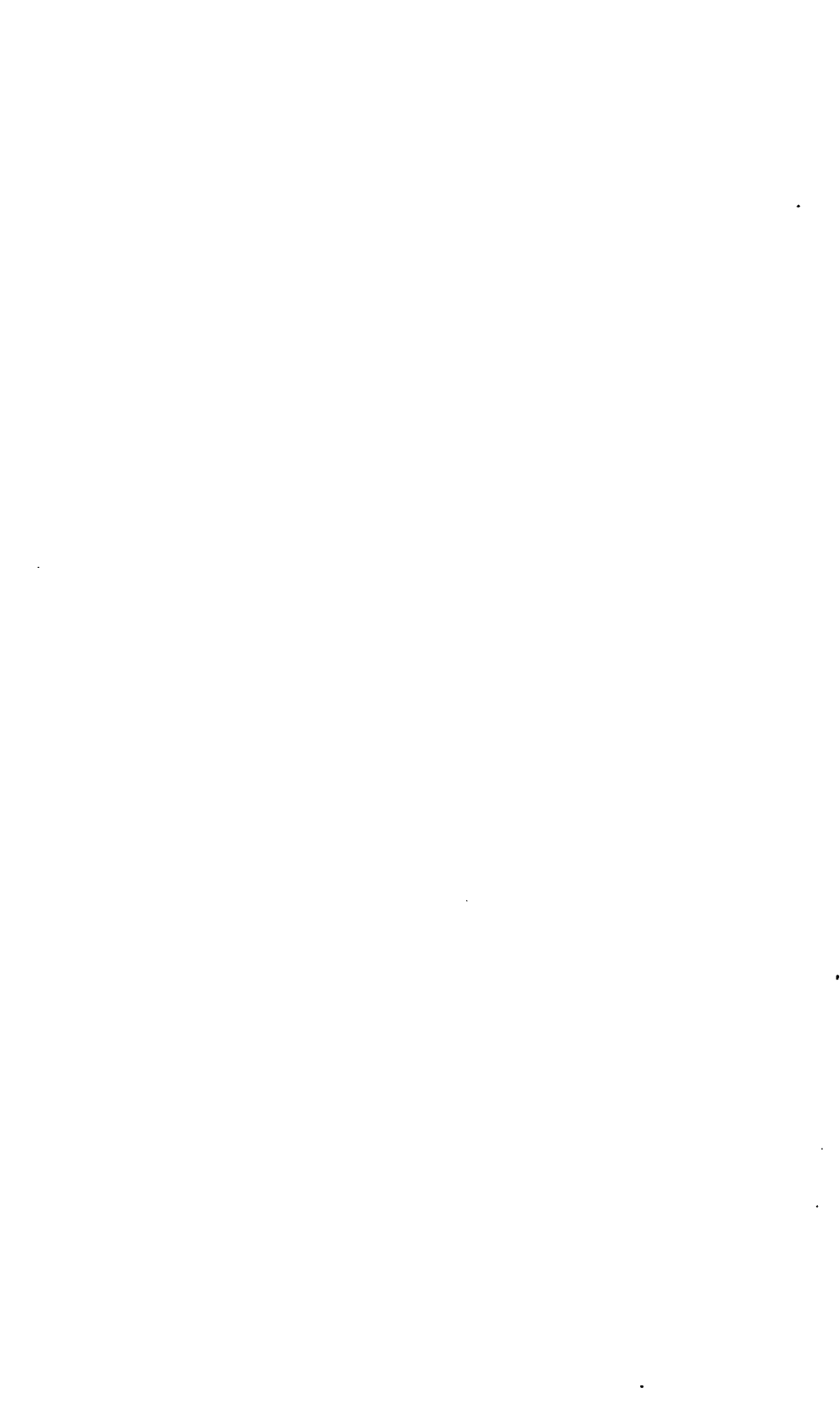
I therefore conclude that when Congress extended the swamp land grant to Minnesota and Oregon, the proviso was inserted by way of reservation of the power to dispose of such lands pending the adjustment of the grant, so that there should be no question whatever touching the title. A good reason for the insertion of this proviso is apparent. Experience has shown that occasional settlements would be made on lands alleged to be swamp or overflowed; generally in those cases where the swampy character of the land was doubtful. Congress designed the reservation, then, not to deprive the State of the benefits to be derived from the grant, but to relieve the title of a settler from all doubt; leaving the State to pursue such remedy for her lands, if any, as Congress had or might provide. The Act of September 28, 1850, must be read with the proviso under consideration, appended or inserted at the end of the first section, so that the granting clause in said act is expressly limited and controlled by the words of the proviso. The effect of this construction is that the grant does not include any lands which the government of the United States may have reserved, sold, or disposed of in pursuance of any law theretofore enacted, "*prior to the confirmation of title to be made under the authority of said act.*" The granting of a patent to a pre-emption claimant of said lands is a "disposition" thereof; it is in pursuance of a law before that time enacted; it was prior to the confirmation of title *to be made* under said act. If these views are correct, the defendant's title is protected by the proviso, and cannot be disturbed in this suit.

Under this view of the swamp land grant, when a settler takes a pre-emption claim under the laws of the United States,

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on lands claimed by this State as swamp or overflowed, and such lands shall be patented to such settler by the United States prior to the confirmation of the grant to the State, such settler, in the absence of fraud, acquires a perfect title, although the land was in fact swamp and overflowed, within the meaning of the act of Congress making the grant to the State.

Entertaining these doubts as to the true construction of the proviso of the act, I place my concurrence in the affirmance of the decree, upon the ground that the plaintiff had a complete and adequate remedy at law.



ROLL OF ATTORNEYS.

Names of Attorneys who have been admitted to the Bar of the Supreme Court of Oregon, commencing with its organization to the present date, showing the date of admission, and a reference to the record where the same is entered. * Deceased; † Removed from the State; ‡ Retired from practice; § Has served on the Bench; ** On the Bench.

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[NOTE. — The foregoing list of the attorneys of the Supreme Court has been compiled from the records thereof, commencing with the earliest formation of the territorial government and continuing to date. While it is thought to contain a complete and reasonably accurate list thereof, it is well known that a number of attorneys whose names are permanently associated with the jurisprudence of the State do not appear thereon, for the reason that no formal admission was ever made in their cases, or the clerk failed to make a proper record. Noticably among these may be mentioned the late William Strong and A. J. Thayer, who were both judges of this court, Hon. Lafayette Lane, Stukely Ellsworth, Judge Chenoweth, and Ex-Chief Justice B. F. Bonham. — EDITOR.]

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ANIMALS.

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2. **BRAND.**—The fact that an animal is branded is not constructive notice of the ownership thereof, although the brand is recorded. The brand simply furnishes evidence of its ownership.—*Id.*
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4. **SECTION 8384 OF THE CODE.**—If the animal was not kept for the particular purpose specified in this section, or the defendants did not have notice of such fact, and they found the animal running at large out of the enclosed grounds of the owner or keeper in any of the months specified in section 8383, they had the right to exercise the power conferred by the statute, without first taking the animal to the owner twice.—*Tucker v. Constable*, 407.

APPEALS.

1. **CONSTITUTION—FINAL DECISION OF CIRCUIT COURT—HOW REVIEWED.**—Under the Constitution of this State, the Supreme Court has jurisdiction to revise the final decisions of the Circuit Courts in all cases, whether rendered in the exercise of common-law jurisdiction, or in the exercise of jurisdiction derived wholly from the statute, and whether the statute has given the right of review or not.—*Mitchell v. Powers*, 487.
2. **STATUTE PROVIDES MEANS OF REVIEWING SUCH FINAL DECISIONS.**—Where the mode of review of final decisions of the Circuit Courts is not specifically pointed out, the Code authorizes any suitable process or mode of proceeding to be adopted, conformable to its spirit.—*Id.*

APPEALS (Continued).

3. PRACTICE—NOTICE OF APPEAL—BY WHOM SIGNED.—A notice of appeal is sufficient, although signed by attorneys who were not the attorneys of the appellant in the court below, and no substitution has been made in the manner provided in sections 1010 and 1011 of the Civil Code.—*Shirley v. Burch*, 1.
4. ADVERSE PARTY—WHO IS NOT.—M., an intervenor in the suit for foreclosure, having entered into a stipulation which precluded him from being heard until the practical determination of the issues of the case and the sale of the mortgaged property, has no such standing in the case as requires him to be made a party to the appeal under section 526 of the Code.—*Id.*
5. NOTICE OF APPEAL—SERVICE UPON PARTNERS.—Service of notice of appeal upon one of two persons, who appear in the suit as partners, is service upon the firm.—*Id.*
6. TRANSCRIPT—WHEN FILED.—By section 541 of the Code, the appellant is required to file with the clerk of the appellate court the transcript of the cause by the second day of the next regular term of said court after the appeal is perfected.—*Bush v. Geisey*, 267.
7. WHEN PERFECTED.—When the notice of appeal was served on the third day of January, 1888, the undertaking filed on the twelfth day of said month of January, the adverse party had five days next after the filing of the undertaking in which to object to the sufficiency of the sureties in the undertaking. No such exceptions having been filed, the appeal is to be deemed perfected on the eighteenth day of said month of January.—*Id.*
8. TIME IN WHICH TO FILE TRANSCRIPT—HOW ENLARGED.—By subdivision 3, section 541, the court or judge thereof may, upon notice to the respondent, enlarge the time for filing the transcript.—*Id.*
9. ENLARGEMENT OF TIME TO FILE TRANSCRIPT—NOTICE OF MOTION.—By section 524 of the Code, when notice of a motion is necessary it must be served ten days before the time appointed for the hearing, unless the court or judge prescribe a shorter time by order indorsed on the notice.—*Id.*
10. NOTICE OF MOTION—WHEN NOT NECESSARY.—Notice of a motion is not necessary except when the Code requires it, or when directed by a court or judge in pursuance thereof.—*Id.*
11. CASE IN JUDGMENT.—Where the appellant on the second day of this term of court took an *ex parte* order without notice, enlarging the time to file transcript, subject to legal objections, the time for the filing of the transcript was not thereby enlarged.—*Id.*
12. SUPREME COURT PRACTICE—ORDER WITHOUT NOTICE.—Order to enlarge time for filing transcript, when taken *ex parte* and without notice, will be disregarded where the attention of the court is called to the matter, and the appeal will be dismissed.—*Id.*
13. NEGLECT TO FILE TRANSCRIPT.—When a party perfects an appeal and then abandons it, his right of appeal is exhausted, the power over the subject is *functus officio*, and cannot be exercised the second time.—*Schmeer v. Schmeer*, 243.
14. BILL OF EXCEPTIONS—WHEN NECESSARY—QUERE.—Where in an appeal from the decision of the Circuit Court in proceedings of insolvency, the record fails to disclose that any final decision was made therein, this court will not consider the same until the record is completed in that particular.—*Mitchell v. Powers*, 487.

APPEALS (Continued).

15. **APPEAL — WHEN LIES.** — In pursuance of which authority rule 14 of this court was adopted, providing that the mode of revision of final decisions of the Circuit Courts in such cases shall be by appeal, as in cases of appeal in judgments at law; and questions of fact shall not be considered upon such appeal unless made a record in the form of a bill of exceptions. In view of these premises, *quære*, has this court the right to consider intermediate proceedings under the insolvent act of this State, unless authenticated in accordance with said rule? — *Id.*
16. **BILL OF EXCEPTIONS — QUESTION NOT ANSWERED.** — To present a question for review in this court, where the question to a witness is not allowed to be answered, the bill of exceptions must show by statement or recital what fact the party offering the testimony expected to elicit by the question. — *Tucker v. Constable*, 407.
17. **BILL OF EXCEPTIONS — MOTION FOR NONSUIT — EVIDENCE.** — Unless it affirmatively appears from the bill of exceptions that it contains all the evidence offered upon the trial, this court will not review the action of the trial court in refusing to order a nonsuit. — *Woods v. Courtney*, 121.
18. **VERDICT — PRESUMPTION — EVIDENCE.** — Unless the contrary is made to appear affirmatively, this court is bound to presume there was evidence sufficient to authorize the verdict. — *Id.*
19. **INSTRUCTIONS — BILL OF EXCEPTIONS — ASSIGNMENTS OF ERROR.** — No assignment of error can be made or will be considered, unless the error appear from the bill of exceptions, or some other part of the judgment roll. — *Coffin v. Taylor*, 375.
20. **EVIDENCE.** — An error of a court in the trial of an action, where from its nature and effect it could not possibly have injured the party against whom it was committed, is not a sufficient ground for the reversal of a judgment obtained therein; but where the error consists in the admission of improper testimony, which was liable to influence the result in any degree, an appellate court cannot disregard it. — *State v. Ching Ling*, 419.
21. **OBJECTIONS — WHEN WAIVED — APPEAL.** — An erroneous decree will not be disturbed by an appellate court where no objection thereto is made by the party to be affected thereby. — *Shirley v. Burch*, 83.
22. **INSTRUCTIONS — PRESUMPTION.** — When the record is silent as to what instructions the court gave the jury, the legal intendment is that they were properly instructed. He who alleges error must make it affirmatively appear from the record. — *Coffin v. Taylor*, 375.
23. **APPELLATE PRACTICE — FAILURE OF APPELLANT TO APPEAR OR FILE BRIEF.** — In a civil case, if the appellant fail to appear in this court and files no brief, the judgment will be affirmed without any examination of the record or the assignment of errors. This court cannot perform the duty of counsel. — *Tucker v. Constable*, 239.

See JUDGMENTS, 5; JUSTICES OF THE PEACE.

ARREST. See HABEAS CORPUS.

ATTACHMENT AND GARNISHMENT.

1. **WHEN AN UNDERTAKING WAS GIVEN,** and the plaintiff released and surrendered the property to the defendant, the attachment was vacated and dissolved, and the undertaking took the place of such property, and the action thereafter ceased to be in rem. — *Bunnaman v. Wagner*, 483.

ATTACHMENT AND GARNISHMENT (Continued).

2. **UNDERTAKING ON.**—A bond or undertaking, as either may be prescribed by statute, to be given to secure the release of property attached, are designed to serve the same purpose and to stand upon the same consideration, and when an action is brought upon either, are governed by like principles. — *Id.*
3. **DISSOLUTION OF.**—If a creditor voluntarily consents to dissolve an attachment levied upon goods of his debtor, and relinquish his lien at the request of any one, the promise of such person to pay the debt thus secured is made upon a valid consideration. The surrender of the lien being a detriment to the creditor is a sufficient consideration for the promise; but to enforce such promise or engagement, it is indispensable that it be in writing. — *Id.*
4. **WHEN, THEREFORE,** the defendant by his undertaking in writing promised and agreed to pay the amount of any judgment which the plaintiff might recover against the defendants in that action, such undertaking was founded upon a valid legal consideration, which the defendant received by the surrender of the property attached, and was good as a common-law obligation. — *Id.*
5. **BONDS OR UNDERTAKINGS** intended to be given in compliance with statutes, although not done so, will, if they are entered into voluntarily and founded upon a valid consideration, and do not violate public policy or contravene any statute, be enforced by common-law remedies. A bond or undertaking given to obtain the release of property seized upon attachment is not rendered invalid by irregularities in making such attachment, when the property was surrendered and the plaintiffs voluntarily consented to dissolve the attachment, nor will such irregularities defeat the liability thereon. — *Id.*
6. **COMPLAINT ON.**—It is not essential that the complaint set out all the facts or various proceedings which authorize the issuing of the attachment. — *Id.*
7. **DEATH OF DEFENDANT AFTER LEVY.**—The death of the defendant after levy of the attachment does not vacate or dissolve it. — *Mitchell v. Schoonover*, 211.
8. **REMEDY—GARNISHMENT.**—The remedy by garnishment is purely statutory, and to make it available the essential requisites of the statute must be complied with. — *Case v. Noyes*, 329.
9. **GARNISHEE—SERVICE OF ALLEGATIONS AND INTERROGATORIES.**—After a garnishee has been required to appear and answer, and before the day fixed for that purpose, or within a time to be specified in the order, the plaintiff may serve upon him written *allegations* and *interrogatories*, and without such *allegations* there is no foundation for any further proceedings against such garnishee. — *Id.*
10. **ALLEGATIONS—AGAINST GARNISHEE.**—The allegations provided by the Code were designed to enable the plaintiff to bring upon the record the cause of action which the original defendant had against the garnishee, and to which the plaintiff has become subrogated by virtue of the attachment. — *Id.*
11. **INTERROGATORIES—ANSWERS.**—The answers which the garnishee is required to make to the interrogatories which must be served with the allegations were designed to further aid the plaintiff in bringing distinctly and clearly before the court the facts in relation to the property attached in the hands of the garnishee, and might be used as evidence upon the trial against the garnishee. — *Id.*
12. **GARNISHMENT—MODE OF TRIAL.**—Proceedings against a garnishee on an attachment or execution issued in an action at law is strictly a proceeding at law, and the mode of trial is the same as in an action at law. It is in no sense equitable, and the mode of trial in a suit in equity cannot be resorted to. — *Id.*
13. **GARNISHMENT—ALLEGATIONS AND INTERROGATORIES.**—Section 164 of Hill's Code requires that plaintiff, after obtaining the order on the garnishee to answer, and before such garnishee is required to appear, or within a time to be

ATTACHMENT AND GARNISHMENT (Continued).

specified in the order, shall serve on such garnishee written allegations and interrogatories, and the plaintiff cannot, after such time has expired, file such allegations and interrogatories, nor can the affidavit, used before the judge to obtain the order on the garnishee to answer, be treated as such allegations. — *Case v. Noyes*, 539.

See COSTS, 4.

ATTORNEYS AT LAW. See MORTGAGES, 10.

BAIL.

BAIL BOND — RECOGNIZANCE — WHAT IS. — Under the Code a bail bond in criminal cases is designed to serve the same purpose, and is in effect like a recognizance at common law. A recognizance is an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified. When forfeited it is made absolute, and some of the authorities indicate that it has the force and effect of a judgment. — *Cobrig v. Klamath County*, 244.

See OFFICE AND OFFICERS.

BILL OF EXCEPTIONS.

1. **TIME OF SIGNING.** — There is no statute in this State fixing the time within which a circuit judge may sign a bill of exceptions. — *The Gong v. Stearns*, 219.
2. **POWER OF THE CIRCUIT JUDGE.** — If during the progress of a trial a party took exceptions which were reduced to writing or noted on the judge's minutes, and for any satisfactory cause he was unable to have his bill of exceptions drawn out in form and signed during the term, the judge who presided at the trial has the power to sign the same afterwards, and it becomes a part of the record with the same effect as if signed during the term. — *Id.*
3. **MOGAN v. THOMPSON**, 13 Or. 230. — This case, so far as it is in conflict with this opinion, is overruled. — *Id.*
4. **MANDAMUS — POWER OF SUPREME COURT.** — As incident to and in aid of its appellate jurisdiction, this court has the power by writ of mandamus to require a circuit judge to settle and allow a bill of exceptions. — *Id.*

See APPEALS.

BONDS. See ATTACHMENT AND GARNISHMENT; BAIL; OFFICE AND OFFICERS; PLEADING AND PRACTICE, 4, 5.

BOUNDARIES.

1. **EVIDENCE OF.** — Where in a disputed boundary, the question to be determined rests wholly on facts, and there are circumstances inherent in the case of weight and importance, which are corroborated in substance by witnesses whose long residence in the neighborhood and opportunity to know give value to their testimony, held, sufficient to establish such boundary. — *Bewley v. Chapman*, 402.
2. **IN THE CONSTRUCTION OF A DEED** to land, the intention of the grantor, ascertained from the various parts of the instrument, taken as a whole, will control the

BOUNDARIES (Continued).

inference to be drawn from general language employed in the description of the courses and distances of the boundary, as to the premises conveyed. — *Rayburn v. Winant*, 318.

3. **IN DEED.**—Where a grantor in a deed clearly evinced an intention to convey the one half of a distinct tract of land, which bordered on tide-water, and the boundary of the moiety was described in the deed as commencing at a certain stake on the south, and running due north to a stake on the north line of said tract; thence west along said line to the corner; thence south to the southwest corner; thence east to the place of beginning; and it appeared that said southwest corner was at the meander line of such tide-water; *held*, that it must be presumed that the beginning point of the boundary was upon said meander line, and that the course from the southwest corner to that point was intended to be along such meander line, and not on a direct line between those points, the said meander line being the south boundary of such half. — *Id.*
4. **WHEN THE BOUNDARIES IN A DEED ARE INCONSISTENT**, the uncertain must yield to the certain description; but when the doubt is as to the accuracy of the particular description, the use which is general often becomes important, and renders that clear which without it would be obscure and uncertain. (Per *LORD, C. J.*) — *Id.*
6. **MEASUREMENT.**—In taking distances from one point to another on navigable water, the measurement is by its meanders, and not in a direct line. (Per *LORD, C. J.*) — *Id.*

BRIBERY. See REWARDS.**COMMON CARRIERS.**

1. **FOR ITS OWN CONVENIENCE AND THAT OF THE PUBLIC**, a railroad company may make reasonable rules and regulations for the management of its business, and the conduct of its passengers. It may prescribe, as a rule, and require all persons before taking passage on its passenger trains to procure tickets to enable them to ride, and in default thereof to pay an additional sum, when it has furnished proper conveniences and facilities to travelers for procuring tickets. — *Poole v. Northern Pacific Railroad Company*, 261.
2. **A COMPANY WHICH HAS PROVIDED A STATION WITHOUT A TICKET OFFICE**, and at which its passenger trains stop, has not put it in the power of the traveler to comply with such rules, and such rule would be unreasonable as applied to such stations, or to such traveler, when he offered to pay the usual fare. If the railroad has failed or neglected to furnish the traveler the opportunity to procure a ticket, and he applies for a passage, or enters their train without having such ticket, but offers to pay the regular fare, it cannot lawfully eject him. — *Id.*

CONSTITUTIONAL LAW. See EMINENT DOMAIN; JURISDICTION; STATUTES.**CONTRACTS.**

1. **CONSTRUCTION.**—In construing a written contract, it is the duty of the court to so construe it, if possible, that every word shall have its appropriate and proper force and effect, and in such manner that no part of it shall be ineffectual. — *Chrisman v. State Insurance Company*, 283.

CONTRACTS (Continued).

2. **EVIDENCE—WRITING.**—Where the terms of a contract are in writing, oral evidence of what the parties thereto intended is not admissible.—*Beezley v. Crossen*, 72.
3. **AGREEMENT—WHEN OBLIGATORY.**—Where an order sets forth the terms of a complete agreement, and it is signed by the party to be charged, it is not essential that the writing should bear the signature of the other party; but to make it obligatory, it is necessary that the other shall have accepted or assented to the terms of the agreement it contains.—*Case Threshing Machine Company v. Smith*, 381.
4. **EXECUTORY CONTRACT.**—An executory contract, in which the plaintiff has obtained the note or memorandum essential to charge the defendant, but has not given a corresponding one itself, may enforce it, although the defendant cannot, and the former having secured, while the other has not, the evidence, which the statute has made indispensable to its enforcement.—*Id.*
5. **SAME.**—In such case the order or contract is a necessary part of the plaintiff's case to show its acceptance of the order and compliance with the terms, but the defendant could not set it up as new matter, for he lacked the evidence which the statute has made indispensable to charge the plaintiff and prove his allegations.—*Id.*
6. **CONDITION PRECEDENT—WAIVER.**—Where a contractor agrees to make alterations in a mill for the purpose of putting improved machinery in the same, the owner of the mill does not, by continuing the use of the mill, waive the performance of conditions precedent to a payment to be made by him for such services.—*Gove v. Island City Mercantile and Milling Company*, 98.
7. **GUARANTY—CONSTRUCTION.**—In a contract to fit up a flouring mill with "improved mill machinery," for the manufacture of flour therein, it was agreed, among other things, that when the mill had been changed in accordance with the plans and specifications agreed upon, it should have a given capacity, and that the quality of the flour to be therein manufactured should be equal to that made by "any mill in Eastern Oregon." *Held*, that this guaranty was made upon the basis of the water-power formerly used in operating the mill, and that a failure to comply therewith was a good defense to an action for a deferred payment to be made upon competition and acceptance of the mill.—*Id.*

CONVERSION.

ACTION FOR TORTIOUS TAKING OF PERSONAL PROPERTY—WHEN MAINTAINABLE.

Where a complaint counted on a tortious taking of personal property, and there was evidence tending to show that it was seized by the defendant C., who was a sheriff at the time, and that he so took it under a writ of attachment against the property of W., and that W. then owned a leviable interest in the same, *held*, that the taking was not tortious, and the complaint could not be upheld. *Held, also*, that an action for the interest of the respondent would arise only on a sale of his said interest by the person making the levy, when an action for the conversion thereof would lie.—*Beezley v. Crossen*, 72.

See WILLS, 9.

CORPORATIONS.

1. **POWERS—CHARTER.**—A corporation being the creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.—*Beers v. Dalles City*, 834.

CORPORATIONS (Continued).

2. **PRIVATE CORPORATION** being the creature of the statute may be sued in such manner as the legislature may provide. The statutes of Oregon prescribe a mode for the commencement of an action against parties, including corporations, and it must be pursued in order to confer jurisdiction upon the court over the person of the defendant. — *Holgate v. Oregon Pacific Railroad Company*, 123.
3. **WHERE SUABLE.**—Section 44 of the Civil Code of the State, which provides that "the action shall be commenced and tried in the county in which the defendants, or either of them, reside, or may be found at the commencement of the action," applies to corporations as well as to natural persons, except so far as the former are affected by subdivision 1 of section 55 of the Code. — *Id.*
4. **DOMICILE.**—The residence of a corporation is deemed to be in the county where it has its principal office or place of business. — *Id.*
5. **VENUE.**—A corporation organized under the laws of the State must be sued in the county where it has its principal office or place of business, or in the county where the cause of action arose. — *Id.*

See LANDLORD AND TENANT, 1; MUNICIPAL CORPORATIONS.

COSTS.

1. **TAXATION OF DISBURSEMENTS—OBJECTIONS—HOW MADE.**—Items claimed as disbursements must be itemized and verified, and objections thereto must be to each item separately, and the reason of such objection must be clearly and distinctly stated. — *Walker v. Goldsmith*, 161.
2. **OBJECTIONS—WHAT NOT CONSIDERED.**—No objection to any item claimed as a disbursement can be considered or entertained unless made before the taxing officer in the court below and within the time allowed by law. — *Id.*
3. **CASE IN JUDGMENT.**—When the item claimed was this: To the clerk of the Supreme Court for copy of evidence and judgment roll in case of *T. v. D.*, composing exhibit \$0, \$250.50. was objected to for the reason that said copy of evidence and judgment roll was procured by the plaintiff for his own use as evidence in said cause, upon an issue of fact tried therein upon which plaintiff was defeated, and upon which final judgment was rendered against him, and in favor of the defendants in said cause. *Held*, that said objections did not present the question sought to be raised on this appeal, namely, that the copy of evidence was incompetent upon the trial of this suit, and that the same was not used upon such trial. — *Id.*
4. **ATTACHED PROPERTY—KEEPER.**—*Semble*, that when a keeper of attached property is necessary, his expense is in the nature of a disbursement, which the plaintiff in the writ might lawfully make, and tax the same in case he should prevail in the same way any other necessary disbursement is taxed in the action. — *Hawley v. Dawson*, 344.

See MANDAMUS.

COTENANCY.

1. **ENTRY BY ONE.**—The general rule is that an entry by one tenant in common is not hostile to the rights of his co-tenants, but is for their benefit as well as his own. — *Northrop v. Marquand*, 174.
2. **OUSTER.**—One tenant in common may oust his co-tenant, and make his possession adverse. — *Id.*

COTENANCY (Continued).

3. **OUSTER—NOTICE—STATUTE OF LIMITATIONS.**—To make the possession of a tenant *adverse*, the co-tenant out of possession must have notice of such exclusive and hostile claim, and the Statute of Limitations only begins to run from the time of such notice. — *Id.*
4. **CASE IN JUDGMENT.**—H. was born in the month of February, 1871; M., owning three fourths of the land, and she one fourth, entered into the possession of the same on the 3d of April, 1871. *Held*, that she was entitled to notice of the hostile character of his claim. This notice could not be given or imparted to her until she was capable in law of receiving it. H.'s as well as the plaintiff's infancy made it impossible to charge or affect them with notice of the nature, character, or extent of the defendant's claim, or of the nature of the title under which he entered, and therefore they were not ousted, and the defendant's possession never became adverse. — *Id.*

COUNTER-CLAIM.

WHILE PARTY MAY KNOW that the defendant intends to set up a claim against his demand and speak of the fact, and indicate a purpose to provide against it, such statement does not concede the right of the adversary, or tend to recognize the validity of his claim. — *Druck v. Nicolai*, 512.

COVENANTS. See DEEDS, 8.

COUNTIES.

SERVICES PERFORMED BY A PARTY, AT THE REQUEST OF A JUDGE OF A COUNTY, acting as a committing magistrate in taking testimony in a case of the State against another party, do not constitute a claim against the county; and a judgment rendered against the county in a Justice's Court upon such a claim, where it has not appeared and answered in the action, will be reversed upon writ of review. — *Union County v. Slocum*, 237.

See MANDAMUS; REWARDS.

CRIMINAL LAW.

1. **SUNDAY—INDICTMENT DATED ON.**—An indictment dated on Sunday is not void under the statute making Sunday a non-judicial day; the defect is only formal at most, if at all, and could only be taken advantage of by proper motion before trial. — *State v. Norton*, 105.
2. **EVIDENCE IN CHIEF—REBUTTAL.**—In a criminal case the State cannot be permitted to withhold a part of its evidence in chief, and then introduce it in rebuttal after the defendant had rested his case. — *State v. Hunsaker*, 497.
3. **EVIDENCE.**—Power of the court to examine in criminal cases far enough to see whether or not there is any evidence to sustain a conviction stated but not decided. — *Id.*
4. **CHALLENGE OF JUROR.**—Where in the trial of a criminal action the counsel for the State challenged a juror for cause, upon the ground that his name did not appear upon the assessment roll of the county for the preceding year, and the counsel for the defendant denied the challenge, and the court sustained it, *quære*, whether the challenge was properly sustained. *Held*, however, that it was immaterial whether the challenge was properly sustained or not;

CRIMINAL LAW (Continued).

that if the holding was erroneous it could not have prejudiced the defendant, and was not, therefore, a sufficient ground for a reversal of the judgment of conviction.—*State v. Ching Ling*, 419.

5. **CRIMINAL EVIDENCE.**—Where upon the separate trial of one defendant, under an indictment charging him and four others with having purposely, and of deliberate and premeditated malice, killed L. Y., evidence of facts and circumstances occurring previously, from which it might be inferred that some of the defendants entertained malice toward L. Y., was offered by the prosecution and admitted by the court. *Held*, that the evidence was incompetent, as against the defendant on trial, where no showing whatever had been made connecting him in any way with such facts and circumstances, or that he was cognizant of them. *Held*, that an exception to the overruling by the court of an objection interposed by the defendant's counsel to the admission of the evidence was well taken; and that the ruling was such an error as to require a reversal of the judgment of conviction recovered in the trial. *Held*, that testimony offered on the part of the defendant as to what he said prior to his going to the place where the homicide was committed, in order to characterize his intention in going there, was not a part of the *res gestæ*, and was, therefore, inadmissible.—*Id.*
6. **REASONABLE DOUBT DEFINED.**—A reasonable doubt, as used in the law of evidence, defined to be a conscious uncertainty in the mind of the jury, after a fair consideration of all the proofs in the case respecting the guilt of the accused.—*Id.*
7. **WRITTEN DOCUMENTS IN EVIDENCE.**—Before written documents can be introduced in evidence against a defendant on trial for crime, which tend to prove his guilt or to cast suspicion upon the good faith of his defense, they must be proved to be his production, or that he personally, or by another, attempted to use them to his advantage. *Held*, therefore, that where C. G. and F. L. D. were on trial charged with the crime of murder, and the trial court ruled that certain papers containing requests to other parties to testify in their behalf were admissible in evidence, upon a showing that the papers had been delivered by some one, it not appearing to whom, to intermediate parties for transmission to the parties upon whom the request was made, and there was no proof of the defendants having prepared the papers, it was error.—*State v. Chee Gong*, 534.
8. **EVIDENCE IN A CRIMINAL PROSECUTION.**—Evidence of an *alibi* in a criminal prosecution is not such a defense as admits guilt upon the part of the defendant for any purpose; it merely tends to refute the testimony of the prosecution that the defendant did the act charged. It is evidence in the case which the jury are to judge the effect and value of, and the court has no right to comment upon it. *Held*, therefore, where the court instructed the jury upon the trial of two defendants charged with the crime of murder, that an *alibi* was very often resorted to by guilty persons as well as innocent ones, and one in which perjury, mistake, and deception are often committed, that it was error. *Held*, further, that an instruction to the jury that the burden of proof was on the defendant to make out the defense of an *alibi*, the State having first introduced proof and shown that the defendants were present at, and committed the alleged fatal assault, was also error.—*Id.*
9. **INDICTMENT.**—An indictment which charged, . . . "did, on, etc., at, etc., unlawfully and feloniously assault one M., with a revolver, loaded with powder and ball, by shooting him, said M., in and upon the body, and by shooting at him, the said M., all with the intent to kill him, the said M., with the said revolver, a dangerous weapon, which he, said K. McL., then and there held

CRIMINAL LAW (Continued).

- in his hand, being then and there within shooting distance of him, said M.,” will sustain a conviction for being armed with a dangerous weapon, and assaulting another with such weapon. — *State v. McLennen*, 59.
10. **LARCENY — INSTRUCTION — BURDEN OF PROOF.** — The defendant claimed that he took the animal — for the larceny of which he stood indicted — by order of his employer, and that he believed it to be the property of his employer. The court instructed the jury that the defendant “must establish that he took the steer under claim of right, color of title, or by mistake.” *Held*, error, because it placed the burden of proof on the defendant. — *State v. Huffman*, 15.
 11. **EVIDENCE — EFFECT OF.** — Where two persons were jointly indicted for larceny, upon a separate trial of one of them for the offense, it is competent for the State to introduce in evidence the conversation between the parties and their conduct at the time, where such conversation tends to prove the larceny charged, or guilty knowledge on the part of the defendant, or the interest with which the defendant on trial received the money alleged to have been stolen. — *State v. Harding*, 498.
 12. **EVIDENCE — WHEN COMPETENT.** — Where upon a trial for larceny the evidence introduced upon the part of the State tended to prove that the defendant had the stolen money in his possession or under his control, such evidence is not rendered incompetent because it further appeared that the defendant proposed to spend a part of such money in a saloon in purchasing wine. — *Id.*
 13. **LARCENY — EVIDENCE.** — Appellant was placed on trial for the larceny of a steer. The evidence showed that his employer ordered him to go and get a certain steer belonging to him, then on the range, and take it to O., to whom he had sold it; that he found the steer in question where he had been directed to get the one belonging to his employer; that he drove it to O.’s slaughter pen and left it there. O. testified that he butchered the steer, and after spreading the hide on the ground he saw the letters “S. G.” branded on the hips; that he left the hide in that condition, with the head of the animal near it, when he left the place on the evening the animal was killed. On being asked what condition he found things in the next morning, he answered, over proper objections from the defendant’s counsel, that “the brand was cut out from the hide, and the head was about one hundred yards from where he left it.” *Held*, there being no evidence tending to connect defendant with these acts, it was incompetent to show the mutilation of the hide after the animal was delivered to O. — *State v. Huffman*, 15.
 14. **INDICTMENT — EQUIVALENT WORDS.** — Hill’s Code, section 1173, punishes whoever shall *forcibly* ravish, etc.; and section 1740 punishes whoever “shall assault another with intent . . . to commit a *rape* upon such person.” *Held*, that in an indictment under section 1740, it was sufficient to charge that the act was done *violently*, etc. — *State v. Daly*, 240.
 15. **CASE IN JUDGMENT.** — Where the evidence tended to prove that the appellant, who was a hack driver in the city of Portland, received the prosecutrix in his hack at a ball for the purpose of conveying her to her home in a distant part of the city, and that before reaching her destination he entered the hack without her consent and made an indecent assault upon her; *held*, that it was for the jury to determine the particular intent with which such assault was made. — *Id.*

See REWARDS.

DAMAGES.

DAMAGES.—Where one defends an action to recover a deferred payment to be made by him upon the completion of the mill, upon the ground of a failure to comply with the contract under which the mill was constructed, he cannot recover general damages for such failure. — *Gove v. Island City Mercantile & Milling Company*, 93.

See REPLEVIN; SPECIFIC PERFORMANCE.

DEDICATION.

DEDICATION.—Where the owner of land lays it off into blocks, lots, and streets, platting it as an addition to a city, and causes the plat, although not acknowledged so as to entitle it to record, to be recorded in the book of deeds, in the office of the clerk of the county in which the land is situated, and sells and conveys any of the lots or blocks by a reference in the description thereof to such plat, it constitutes an irrevocable dedication to the public of the streets shown upon it, and where the limits of the city are subsequently extended so as to include such addition, the corporate authorities thereof have the right, at any time, when the public necessities require it, to use such streets as public thoroughfares. It is not essential in such cases to the validity of the dedication that the city authorities formerly accept it, or proceed at once to have the streets opened and improved. The dedication only implies that the streets will be used as such when the public exigencies require it; and until they are opened and improved they remain in abeyance. A party making a dedication of streets in such manner can only reclaim their use when the object and purpose of making it have utterly failed. Where T. C. and M. C., owners of land, sold and conveyed a portion thereof to one F., which was described in the deed of conveyance as a part of a certain block in a certain addition to the city of P., and referred in the description thereof to a plat of said addition as recorded in a certain book of deeds in the office of the clerk of the county of M., that being the county in which the land was situated, and the evidence in the case disclosed that the plat was recorded as referred to in the deed, and the other deeds were shown to have been executed to lots in such addition by reference thereto, and that the records failed to show that any other plat of said addition had been recorded at the time; *held*, that said references amounted to a recognition that the plat was real, and that the evidence was sufficient to authorize the jury to find that T. C. and M. C. made it and caused it to be recorded; *held, further*, that the transaction amounted to a dedication of the streets shown upon such plat, and that neither the said T. C. and M. C. nor their grantees had any authority to revoke it as to any of them. *Held*, that the grantees from the parties making such dedication had no authority to make a new map or plat, substituting a new street or way in place of an old one, without the consent of the purchasers of blocks and lots under the former plat, and of the public. *Held*, that although a common-law dedication of land does not pass the legal title thereto out of the party making it, yet that it is sufficient to defeat an action at law for the recovery of the possession of the property as against those who are using it, in accordance with the object and purpose for which it is dedicated. *Held*, that where a plaintiff in an action for the recovery of the possession of real property, and damages for wrongful withholding of it, seeks to aggravate the damages by showing a special injury to the freehold, the defendant has a right to show that the acts consisted in the erection of a structure thereon; that the plaintiff would succeed to the title to it in case of recovery; and that it would be valuable to him. — *Meter v. Portland Cable Railway Company*, 500.

DEEDS.

1. **DELIVERY.**—A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both.—*Flint v. Phipps*, 437.
2. **POSSESSION OF GRANTEE—PRESUMPTION—BURDEN OF PROOF.**—A deed properly executed in the possession of the grantee is presumed to have been delivered to him. He who disputes this presumption has the burden of proof, and must show that such deed was never delivered.—*Id.*
3. **DEED MAY BE DELIVERED AS AN ESCROW TO ANY PERSON OTHER THAN THE GRANTEE**, and does not become a conveyance so long as it remains in that condition, or until the condition is performed upon which it is to take effect. To make the delivery conditional, it is not necessary that any express words should be used that it was delivered as an escrow to make it such; that conclusion is to be drawn from all the facts and circumstances. If at the time of the delivery the party expressly declare that he delivered it as an escrow, it obviated all question as to the intention, but that is not essential to make it an escrow.—*Gaston v. Portland*, 255.
4. **ESCROW.**—It is not necessary that the condition upon which a deed is delivered in escrow be expressed in writing; it may rest in parol, or be partly in writing and in part oral.—*Id.*
5. **CONSTRUCTION—NATURE OF ESTATE.**—Defendant agreed to convey land to the plaintiff, and plaintiff agreed that one fourth of the land should be used as a cemetery, and to expend four hundred dollars in building a road to the same; that the proceeds of the sales of burial lots should be used in improving the grounds, and that one burial lot be conveyed to each of the grantors. A deed was executed pursuant to this agreement upon the "expressed terms, conditions, and reservations," and in consideration that plaintiff perform such stipulation; but no right of entry was reserved, nor was it provided that said estate should cease on non-performance. The grantee was put in possession. *Held*, that such deed conveyed an absolute estate.—*Portland v. Terroilliger*, 465.
6. **BREACH OF CONDITION—CITY ORDINANCE.**—Such stipulations are not violated by a city ordinance, prohibiting the burial of the dead within the corporate limits of plaintiff, which was made operative over such cemetery by a legislative act enlarging the boundaries of the city so as to embrace the same.—*Id.*
7. **CONVEYANCE—TRUST—RESULTING.**—In 1865, one Coffin executed a deed of "the levee" to the City of Portland without consideration, and in trust for a public "levee" or "landing." In 1871, he executed a second deed in consideration of two thousand five hundred dollars, reciting the former one, and also releasing a ferry privilege which Coffin held on the premises. *Held*, (1) That the latter deed conveyed from Coffin to the city the reserved rights of Coffin, and operated as a confirmation of the prior conveyance, and no resulting use or trust could arise in favor of Coffin's heirs, whatever disposition the city made of the premises. (2) A condition subsequent in a deed that will under any circumstances defeat the title conveyed must provide that the conveyance is upon condition, and that the failure to perform it will operate as a forfeiture of the estate. (3) Equity will not decree a forfeiture. The remedy is by re-entry for condition broken.—*Coffin v. Portland*, 77.
8. **COVENANT OF WARRANTY—BREACH—EVIDENCE.**—In an action founded on a covenant of warranty in a deed where the grantee surrenders to another title without judicial process, he must prove the existence of such paramount outstanding hostile title, and that it was asserted.—*Brown v. Corson*, 838.

See BOUNDARIES; FRAUDULENT CONVEYANCES; MARRIED WOMEN.

DISTRICT ATTORNEYS. See **OFFICE AND OFFICERS.**

DIVORCE. See **MARRIAGE AND DIVORCE.**

EJECTMENT.

PLEADING—COMPLAINT.—It is necessary in an action of ejectment that the complaint should allege that the plaintiff is entitled to the possession of the premises sought to be recovered. — *Richards v. Creus*, 58.

EMINENT DOMAIN.

1. **CONSTITUTIONAL LAW—EMINENT DOMAIN—PUBLIC USE.**—It is not for the courts to say in what particular instances or for what particular purposes the power of *eminent domain* may be exercised. That belongs exclusively to the legislature, limited only by the Constitution, and that is, the use must be public, and just compensation must be made. — *Dalles Lumbering Company v. Urquhart*, 67.
2. **PUBLIC USE—QUESTION FOR THE LEGISLATURE—WHETHER.**—If the public interest can be in any way promoted by the taking of private property, it is in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the power of *eminent domain*, and to authorize an interference with the private rights of individuals for that purpose. — *Id.*

EQUITY. See **EXECUTORS AND ADMINISTRATORS**, 2; **WILLS**, 9.

ESTATES OF DECEDENTS.

INTESTACY—CHILD NOT NAMED OR PROVIDED FOR.—Under section 3075 of Hill's Code a testator is deemed to have died intestate, as to any child or children, or the descendants of any such child or children, in case of their death, not named or provided for, although born after the making of such will or the death of the testator. — *Northrop v. Marquam*, 173.

ESTOPPEL. See **JUDGMENTS**, 6.

ESTRAYS. See **ANIMALS.**

EVIDENCE.

1. **COMPETENCY.**—Where it becomes necessary to prove that the defendants had knowledge of a particular fact, proof that such fact was "generally known" is not competent for that purpose. — *Tucker v. Constable*, 407.
2. **PARTIES—RECORD OF FORMER ACTION.**—Where the record of a former action is offered in evidence, it cannot be objected that the former action involved other parties, when the person making that objection was one of such parties, though in connection with other persons; but this has no application to a nominal party to the record, as an officer, without any beneficial interest in the subject-matter of the litigation. — *Krause v. Herbert*, 429.
3. **PRACTICE—MOTION TO STRIKE OUT TESTIMONY.**—A motion to strike out testimony is in the nature of a demurrer to the evidence, and must be tested by the same rules. — *Hawley v. Dawson*, 344.

EVIDENCE (Continued).

4. **DEMURRER TO EVIDENCE — WHAT IT ADMITS.** — The demurrer to evidence admits all that the testimony objected to has proved, and all that it tends to prove. — *Id.*
5. **MOTION TO STRIKE OUT TESTIMONY WHEN PART ADMISSIBLE.** — A motion to strike out the testimony of a witness cannot be sustained if any part of it is admissible. — *Id.*

SEE APPEALS; CONTRACTS; CRIMINAL LAW; JURY AND JURORS; NEGOTIABLE INSTRUMENTS; PUBLIC LANDS; WITNESSES.

EXECUTIONS.

1. **DORMANT JUDGMENT — MOTION FOR LEAVE TO ISSUE EXECUTION.** — If five years are allowed to elapse after the entry of judgment without an execution having been issued thereon, no execution can thereafter issue on such judgment without leave of court. — *Pursel v. Deal*, 295.
2. **LEAVE TO ISSUE EXECUTION — MOTION — SUMMONS.** — To obtain such leave, the party must file his motion properly verified with the clerk, and cause a summons to be served on the judgment debtor in like manner and with like effect as in actions at law. — *Id.*
3. **"CAUSE OF ACTION."** — The right of a judgment creditor to obtain leave of court to issue an execution on a judgment that has become dormant by lapse of time is "a cause of action," within the meaning of section 56 of the Code. — *Id.*
4. **PARTY — ACTION RELATING TO REAL PROPERTY IN THIS STATE.** — A proceeding to obtain leave to issue execution upon a dormant judgment is not "an action relating to real property in this State," within the meaning of section 56 of the Code. — *Id.*
5. **VACATING SHERIFF'S RETURN.** — If the court below acted irregularly in vacating the sheriff's return on execution, it furnishes no ground of complaint to the plaintiff unless he can show he was injured in some way. — *Id.*

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTOR AND ADMINISTRATOR.** — At common law, a general judgment against an executor who did not plead *plene administravit* or *præter*, is conclusive evidence of assets in a second action of debt suggesting a *divestavit*, the only qualification being that a matter arising subsequent to the former action, showing a destruction of the assets or removal of them from the hand of the executor without fault, may be set up. — *Brenner v. Alexander*, 349.
2. **EQUITABLE RELIEF.** — A party can come into a court of equity for relief after a judgment at law only when he has been deprived of a legal right by fraud, accident, or mistake, unmixed with negligence or fault on his part. An executor or administrator in founding a right to such relief must exhibit a case free from negligence or misconduct. — *Id.*
3. **EXECUTOR, JUDGMENT AGAINST.** — Where an executor or administrator, believing that he has assets sufficient to pay all debts, suffers judgment against himself, he will be relieved in equity; if the assets become insufficient through an unexpected depreciation of their value, the reason is that the defense arises subsequently to the judgment, and without fault of the administrator. But if an executor or administrator confesses judgment against himself for a debt of his testator or intestate, upon a miscalculation of assets in his hands, and it appears afterwards that the assets are insufficient to satisfy it, he will not be relieved in equity against the judgment. — *Id.*

EXECUTORS AND ADMINISTRATORS (Continued).

4. AN EXECUTOR is a person to whom the decedent has confided the execution of his last will, and he derives his appointment from it. Letters testamentary issued by the probate judge are but the authentic evidences of the power conferred by the will, and are founded upon the probate of that instrument. — *Holladay v. Holladay*, 147.
5. EXECUTOR, ELIGIBILITY OF. — At common law, all persons capable of making wills, and some others besides, are capable of being made executors, and from the earliest time, it has been the rule that every person may be an executor, saving such as are expressly forbidden. Our Code has disqualified many persons, who, at common law, were competent to serve as executors, the tendency of modern legislation being to enlarge the control of Probate Courts in respect to testamentary appointments; but the principle by which the court is to be guided in determining to whom letters testamentary are to be issued remains unchanged. — *Id.*
6. WILLS — LETTERS TESTAMENTARY. — As at common law, so under the statute, all persons not expressly forbidden may serve as executors, and when one or more are so appointed by the testator, the court must give heed to his choice, and issue the necessary letters to enable such representative to perform his trust. It was therefore held, that when a will is proven, it is the plain duty of the court to grant letters testamentary to the person named in the will, upon his application, who is not disqualified by the statute. — *Id.*

See WILLS.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCE — EVIDENCE OF INTENT. — In a suit by a judgment creditor against a defendant to subject real property to the payment of the judgment, upon the grounds that the debtor purchased the property, and caused a deed thereof to be made to the defendant with intent to hinder, delay, and defraud the creditors of the debtor, the question of fraudulent intent is one of fact and not of law; and in order to entitle the plaintiff in the suit to the relief, he must establish such fact, either by direct proof, or by the proof of facts and circumstances from which the intent may reasonably be inferred, and he must also allege and prove that he was so hindered, delayed, or defrauded. In suits of the character referred to, the question of fraudulent intent must be determined from the facts and circumstances of the particular case decided. The law furnishes no test by which it can be determined further than it adjudges what acts are *indicia* of fraud, or which constitute badges of fraud. — *Weaver v. Owens*, 301.
2. ADVANCEMENT — FRAUDULENT INTENT. — Where it appeared that one O. bought a house and two lots at the price of eight hundred dollars, and had the deed executed to his daughter, a girl fifteen years of age, who was residing with her father and being supported by him; that O. was largely indebted at the time; that among his liabilities was one in favor of W. on account of the latter becoming security for him upon a bond of ten thousand dollars executed to the bank, to enable O. to obtain a credit for such amount; that O. had drawn from the bank nearly seven thousand dollars more than his deposits at the time the deed was executed; that about a month and a half thereafter O. gave a new bond to the bank for the sum of fifteen thousand dollars for the like purpose, upon which W. also became security, and the ten-thousand-dollar bond was surrendered; that O. continued his account at the bank for more than a year and a half after the execution of the deed, when his business collapsed and he suddenly died; that during the time referred to his indebtedness greatly augmented; that the

FRAUDULENT CONVEYANCES (Continued).

day before he died he executed his promissory note to W. for the sum of three thousand dollars, supposed to have been on account of the latter's liability as such surety for him; that W. commenced an action against O. upon the said note on the day on which the latter died, and subsequently recovered a judgment against his administrator for the amount. And it appearing also, that O. was extensively engaged in business at the time of the execution of the deed, was receiving and paying out large sums of money, was the owner of lands and live stock, notes and accounts, appraised at his death at more than twenty-five thousand dollars; that his account at the bank, debit, and credit, between the time of the execution of the deed and of his death, amounted to fifty thousand dollars; that the balances against him at the latter time was on account of checks, drafts, and orders drawn by him upon the bank within the three or four months next prior to his death; that during the same period he received from and paid to other parties various sums of money amounting to many thousands dollars; that he promptly paid demands against him, and maintained his credit to within three months of his death; that he paid off all indebtedness against him existing at the time the deed was executed, excepting one note of twelve thousand dollars, and he paid four thousand dollars upon that; but that he incurred other indebtedness, and died hopelessly insolvent. It also appeared that he purchased the house and lots subject to a mortgage of two hundred and fifty dollars, and that he turned in as part payment of the purchase price a plow and wagon. It further appeared that the conveyance of the property to the daughter was intended by O. as an advancement to her, similar to one he previously made to her elder sister; that the deed was not filed for record until the day before his death, but that he made no effort to conceal the fact; nor did it appear but that W. was cognizant of it when he signed the second bond; nor did it appear that he attempted to dispose of any of his other property in order to evade the payment of his debts. *Held*, by the majority of the court in a suit by the administrator of W. to subject the house and lots to the payment of the judgment upon the note, that such facts did not warrant the inference that O. caused the deed to be made to the daughter with intent to hinder, delay, or defraud his creditors, or that W. was so hindered, delayed, or defrauded in consequence thereof; that if the conveyance had included a considerable portion of O.'s property, thereby having the effect to deprive creditors of a material part of their security, or have crippled him in the prosecution of his business, such an inference might reasonably be deduced; but the advancement in view of all the facts and circumstances of the case was too insignificant to justify it. — *Id.*

3. VOLUNTARY CONVEYANCE BY ONE WHO IS INSOLVENT. — A voluntary conveyance to a child by one who is an insolvent, where he continues in the possession of the property and fails to put the deed on record unexplained, evinces a fraudulent purpose and design to keep the state of the title to the property concealed, and mislead those with whom the party had dealings. (Per STRAHAN, J., dissenting.) — *Id.*
4. VOLUNTARY CONVEYANCES — FRAUDULENT INTENT. — When a party conscious of his insolvent condition, causes the title to a piece of real property to be vested in his minor daughter, with the intent of placing it beyond the reach of his creditors, and fails to record the deed, and continues in the possession of the property, such transaction is fraudulent in fact, and a creditor may attack it for that reason. (Per STRAHAN, J., dissenting.) — *Id.*
5. SUBSEQUENT CREDITOR — WHO NOT DEEMED. — When a party is insolvent and continues in business, and is constantly contracting new debts and paying off old ones, and makes a voluntary disposition of his property, such new creditors

FRAUDULENT CONVEYANCES (Continued).

are not to be deemed *subsequent creditors* within the meaning of those authorities holding that a subsequent creditor cannot attack a conveyance for fraud. (Per STRAHAN, J., dissenting.) — *Id.*

6. **STATUTORY CONSTRUCTION.** — The statute prohibiting fraudulent conveyances ought, for the purpose of accomplishing its objects, to be liberally construed. (Per STRAHAN, J., dissenting.) — *Id.*

GARNISHMENT. See **ATTACHMENT AND GARNISHMENT.**

HABEAS CORPUS.

WHEN LIES — ARREST IN CIVIL ACTION — VOIDABLE PROCESS. — The writ of habeas corpus will not lie to procure the discharge of a person detained by process issued in civil actions, on an affidavit which merely alleges in the statutory language that "the defendant fraudulently contracted the debt sued on," without alleging the facts which constitute the fraud, such defect in the affidavit made the process voidable only, not absolutely void. — *Barton v. Saunders*, 51.

HOMICIDE. See **CRIMINAL LAW**, 5-9.

HUSBAND AND WIFE. See **MARRIED WOMEN.**

INDICTMENTS. See **CRIMINAL LAW.**

INFANCY. See **STATUTE OF LIMITATIONS**, 3, 4; **WILLS**, 5-9.

INJUNCTIONS.

WHERE UNDER CITY CHARTER, two modes are allowed in the improvement of the streets of the city, by one of which the cost thereof may be paid out of the general funds of the city, and by the other, may be charged to the property adjacent to the improvement, and the common council has caused a street to be improved, an injunction will not be granted at the suit of a resident taxpayer to restrain the city officers from paying the expenses thereof out of the general fund, without showing in his complaint that the street was proposed to be improved, and made a charge upon the property adjacent thereto. — *Steffin v. Hill*, 232.

INSANITY. See **WILLS**, 1-4.

INSTRUCTIONS. See **JURY AND JURORS.**

INSURANCE.

1. **FIRE INSURANCE — INTEREST OF INSURED.** — The insured must have an insurable interest in the property both at the time the insurance is effected and at the time of the loss. — *Chrisman v. State Insurance Company*, 283.
2. **PLEADINGS — PLAINTIFF'S INTEREST IN PROPERTY INSURED.** — The plaintiff's interest in the property insured being one of the essential facts upon which his right of recovery depends, in an action founded on a policy against damage by fire, such interest must be alleged in the complaint. — *Id.*

INSURANCE (Continued).

3. **POLICY — INTEREST OF THIRD PARTY.** — Where a policy is issued to one party and assigned to another, who has succeeded to the interest in the property covered by the policy, and in consenting to such assignment the company agrees that the "loss, if any, shall be payable to C., mortgagee, as his interest may appear," in an action on the policy by C.; *held*, that the action might be sustained in his name, but the complaint must make his interest *appear*. — *Id.*
4. **APPLICATION — POLICY.** — Where an application for insurance is referred to in the policy as the basis of the contract, and it is agreed that it shall be deemed and taken as a part of the policy and as a warranty on the part of the assured, both the application and policy are to be construed together as one entire contract. — *Id.*
5. **POLICY — TERMS OF.** — The statement in a policy which makes an application a part of it, and which contains various warranties on the part of the assured, the further statement therein that any false or untrue answers or statements material to the hazard of the risk shall render this policy void does not defeat, qualify, or limit the express warranties contained in the policy. — *Id.*
6. **APPLICATION — FAILURE TO ANSWER QUESTIONS TRULY OR TO MAKE KNOWN EXPOSURES.** — Where the applicant agrees in his application that if it does not truly answer the following interrogatories, and correctly describe, state, and make known the proper value, the title, the location, the *exposures*, the occupancy, the liens and encumbrances thereon, then the said policy should be void. The answers made by the assured to the questions are express warranties, and if they are untrue no recovery can be had upon the policy. — *Id.*
7. **WARRANTY — REPRESENTATION.** — The distinction between a warranty and a representation is that a warranty must be true, while a representation must be true only so far as it is material to the risk, and it is material when a knowledge of the truth would have induced the insurers to have refused the risk or to have charged a higher rate of premium. — *Id.*

INTEREST. See JUDGMENTS, 2.

INTOXICATING LIQUORS. See STATUTES, 3.

JUDGMENTS.

1. **JURY — WAIVER OF.** — When the trial of a case, involving an issue of fact, is had without a jury, and the court directs a judgment, but fails to give a decision in writing stating the facts found and conclusions of law, as required by the Code, such judgment is irregular, and should be set aside upon the attention of the court being called to the fact. A judgment so entered is not void, but may be rendered so, either upon motion to the court in which it is entered, or upon appeal to a Superior Court. — *Bush v. Geisy*, 355.
2. **PLAINTIFF'S APPEAL — CASE IN JUDGMENT.** — Where the jury returned a verdict in favor of the plaintiff, and "assessed his damages at \$1,356, with interest thereon from September 29, 1885, to date, at eight per cent per annum, amounting in the aggregate to \$1,613.64;" *held*, that the court did not err in rendering a judgment for \$1,356. — *Hawley v. Dawson*, 344.
3. **DECEASED PARTY.** — A judgment rendered by a court of general jurisdiction against a party after his death is not for that reason void. It is erroneous, but until reversed by some appropriate proceeding it is valid. — *Mitchell v. Schoonover*, 211.

JUDGMENTS (Continued).

4. **DEATH OF PARTY — DELAY OF COURT.** — Where a party has so prosecuted his action that he is entitled to a judgment without further contest, or where by delay of the court he fails to obtain judgment when he is entitled to it, and his adversary dies, it is the duty of the court upon proper application to render judgment in favor of such party as of a time when the adverse party was living. — *Id.*
5. **TIME — FRACTIONS OF A DAY — JUDGMENT.** — For the purpose of defeating a judgment rendered by a court of general jurisdiction, the legal representatives of a deceased party will not be heard to allege that his intestate died on the same day of the rendition of such judgment, but at an hour previous thereto. — *Id.*
6. **ESTOPPEL BY JUDGMENT ONLY OPERATES BETWEEN PARTIES AND PRIVIES.** — There is no such privity between a sheriff and a plaintiff in an attachment as to render a judgment recovered against the sheriff by a keeper of attached property, for services as such keeper, a bar in favor of the plaintiff in the writ when sued on a contract to pay for another part of the same services. Estoppels by judgment only operate between parties and privies. — *Hawley v. Dawson*, 314.

See APPEALS; EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 3; RES ADJUDICATA.

JUDICIAL SALES. See WILLS, 7, 8.

JURISDICTION.

CONSTITUTIONAL LAW — JURISDICTION — CIRCUIT COURTS. — By article vii., section 9, of the Constitution, all judicial powers, authority, and jurisdiction not vested by the Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the Circuit Courts. — *Ferdier v. Bigne*, 203.

See TAXATION.

JURY AND JURORS.

1. **EVIDENCE — PROVINCE OF JURY TO WEIGH.** — If there is any evidence upon a controverted question of fact before the jury, it is their peculiar province to determine its effect and sufficiency. — *State v. Daly*, 240.
2. **AN INSTRUCTION.** — "Before you can find for the defendant you must be first satisfied that a warrant was made," is not error. — *Druck v. Nicolai*, 512.
3. **INSTRUCTIONS.** — The court has no right to direct as to the credence the jury shall give to any evidence submitted to them. — *State v. Huffman*, 15.
4. **CHARGE TO JURY.** — Under the statute of this State, it is error for the court to charge the jury as to the effect and value of certain of the evidence given at the trial. — *Meyer v. Thompson*, 194.
5. **JUROR — CHALLENGE BECAUSE NOT ON TAX ROLL.** — *State v. Ching Ling*, 16 Or. 419, followed. — *State v. Harding*, 493.

See CRIMINAL LAW, 4; JUDGMENTS, 1; PLEADING AND PRACTICE, 6; VERDICT; WITNESSES, 1.

JUSTICES OF THE PEACE.

1. **APPEAL FROM A JUSTICE OF THE PEACE — FILING NOTICE — PROOF OF SERVICE.** — Section 2119 of Hill's Code requires the notice of appeal to be filed with the justice, "with the proof of service indorsed thereon." The filing of notice without such proof of service is ineffectual for any purpose. (*Briney v. Starr*, 6 Or. 207, approved and followed.) — *Union County v. Slocum*, 237.

JUSTICES OF THE PEACE (Continued).

2. A WRIT OF REVIEW under the Code of this State is the proper remedy to obtain a review of a judgment of a justice of the peace, rendered against the plaintiff in the writ, for the want of an answer. — *Id.*

LANDLORD AND TENANT.

1. RECEIVERS—CORPORATIONS.—In an action for waste committed by a tenant in possession under a lease, which confers on him the privilege of purchasing the demised premises, it is no defense to the same to show that at the time of the grievances complained of, the defendant (railroad company) was in the hands of a receiver. — *Powell v. Dayton, etc. Railroad Company*, 33.
2. LEASE WITH PRIVILEGE OF PURCHASE—WASTE.—A tenant in possession, under a lease containing a clause conferring upon him the privilege of purchasing the demised premises, having failed to exercise his said privilege within the time allowed, is liable for waste committed on the premises during his possession. — *Id.*
3. REMEDIES—ELECTION OF.—In an action for waste committed by a tenant in possession under a lease containing a privilege to the tenant to purchase the demised premises, it is no bar to plead that the landlord had brought an action for the purchase price stipulated in the lease, which action was dismissed because the plaintiff therein failed to show a compliance with the contract on his part, by a tender of the deed at the proper time, the remedies not being concurrent. — *Id.*

See SALES; STATUTE OF LIMITATIONS, 2.

LARCENY. See CRIMINAL LAW, 10-13.

LIENS. See MECHANICS' LIENS; MORTGAGES.

LOST PROPERTY.

1. AT COMMON LAW THE FINDER OF LOST PROPERTY has a valid claim to the same against all the world except the true owner, and he was bound to hold it for the owner, and was liable for misdelivery; but the provisions of our statute as to lost property has modified this rule. — *Sovern v. Yoran*, 269.
2. WHERE MONEY WAS FOUND HID IN THE EARTH AND THE SURROUNDINGS, evidence that it was intentionally deposited in the place found for safe-keeping, but the defendant not knowing to whom it belonged, and there being no marks on it or other indication by which the owner could be known, and the defendant treated as subject to the provisions of such statute, *held*, that such money was not lost money, and not subject to distribution according to such statute. — *Id.*
3. MONEY OR GOODS THAT ARE LOST are the only kind that can be said to be found. It is property that the owner has involuntarily parted with, and not property that he has intentionally concealed in the earth for safe-keeping. It is not the purpose of our statute to treat money or goods hidden and found as lost property, when the owner is unknown, but the statute is intended to apply only to what may be properly denominated lost property. As the effect of the statute is to innovate the common-law rule in destroying the title of the owner of lost property after the lapse of a certain period, upon compliance with its provisions, *held*, that it ought not by construction or otherwise to be extended to cases which do not come plainly within its purview, or other than those upon which the facts may be properly considered lost property. — *Id.*

LOST PROPERTY (Continued).

4. **MONEY OR GOODS WHEN FOUND, ALTHOUGH THE OWNER IS UNKNOWN**, which has been hidden in the earth by the owner for safe-keeping, cannot be considered as property of which he has casually or involuntarily parted with the possession, or lost property to which the statute applies, and in such case, if the finder undertakes to deal with it as lost property, his acts thereby will not impair or divest the title of the owner or his representatives, or defeat their right to their recovery. Where the defendant after having pursued the mode prescribed by the statute for lost property to discover the true owner of money which had been found concealed in the earth under the floor of the barn for safe-keeping, and such means failed to ascertain to whom such money belonged, and there being no marks on it to indicate its ownership, upon the assumption that the statute applied, and that the finders would be liable to suit unless distributed according to its provisions, delivered it as therein prescribed. *Held*, that in doing this the defendant asserted no right or title of himself to the property, or dominion over it, or assumed the right to dispose of the property by virtue of any claim of title over it, but that he acted in good faith, upon the mistaken assumption that the law required him to do what was done, and was, therefore, not liable for conversion. — *Id.*

MANDAMUS.

MANDAMUS—WRIT OF—PEREMPTORY.—Where in proceedings of mandamus, to compel the defendant, who is county treasurer, to pay the plaintiff warrants held by him, duly drawn upon the defendant as such treasurer, it is ascertained in an issue made upon the return of an alternative writ that the defendant had funds sufficient to pay such warrants at the time they were presented to him, applicable to the payment thereof, and that the warrants presented were legal claims against the county; *held*, that the judgment should direct the issuance of a peremptory writ, commanding the defendant to pay the warrants forthwith. The right of a plaintiff in a mandamus proceeding to recover costs, under the Code of this State, does not depend upon his claiming or recovering damages therein. He is entitled to costs as a matter of course upon obtaining the relief sought. — *Bush v. Geisy*, 855.

See **BILL OF EXCEPTIONS**, 4.

MARRIAGE AND DIVORCE.

1. **DISSOLUTION OF MARRIAGE.**—When a decree is given dissolving a marriage, the care and custody of the minor children should be given to the party not in fault, unless there is evidence showing that it would be manifestly improper to do so, and a special finding of fact made by the court to that effect. — *Lambert v. Lambert*, 485.
2. **CARE AND CUSTODY OF MINOR CHILDREN.**—In providing for the future care and custody of the minor children in such a case, the principal matter for consideration is, what will be to their best interest and welfare, which should be paramount to every other motive or influence. — *Id.*
3. **DIVORCE—POWER TO GRANT—STATUTORY.**—The power to grant a divorce, and such other relief as is usually incidental thereto, is purely statutory. — *Weber v. Weber*, 168.
4. **DIVORCE—PLEADING—WIFE'S SEPARATE PROPERTY.**—In a divorce suit by a wife, her pleading ought to allege what personal property of hers the husband has in his possession or control, to enable the court to make a decree in her favor therefor. — *Id.*

MARRIAGE AND DIVORCE (Continued).

5. **DIVORCE SUIT—PLEADING IN.**—In a divorce suit by the wife, when she alleges that certain personal property is the property of her husband, a decree finding the same is her separate property will be reversed as unauthorized and contrary to the pleadings. — *Id.*
6. **DIVORCE—CRUEL AND INHUMAN TREATMENT.**—Divorce granted where it appeared that on one occasion defendant forcibly ejected plaintiff from his bed, and afterwards used violence upon her person, and on one or two other occasions used violence towards her, and that he accused her of adultery, and unsuccessfully attempted to prove upon the trial that she was guilty of the accusation. — *Herberger v. Herberger*, 327.
7. **EVIDENCE—ADULTERY—WHAT NOT SUFFICIENT.**—Proof that the persons accused of adultery, a niece and uncle, maintained the usual and common amenities between like relations in their condition and situation, and had opportunities and might have committed the crime, is not sufficient to establish it. Where circumstances are relied upon they should lead to the conclusion of adulterous intercourse as a necessary conclusion. — *Id.*

MARRIED WOMEN.

1. **AT COMMON LAW, A MARRIED WOMAN COULD NOT CONVEY HER REAL ESTATE**, neither separately nor in conjunction with her husband. The effect of the marriage was to destroy her legal identity, and to confer on her husband the ownership of her personal property, the rents and profits of her real estate, and curtesy. As a result of this principle, the *corpus* of her realty was beyond the reach of either husband and wife, and it descended to her heirs until the origination of fines and recoveries, whereby, with the consent of her husband, she was enabled to alien her lands. — *Clark v. Clark*, 224.
2. **WHENEVER A MARRIED WOMAN WAS A PARTY TO A FINE**, it was necessary that she should be examined apart from her husband to ascertain whether she *joined* in the fine of her own free will or was compelled to do it by threats and menaces. In lieu of the conveyance by fine, the less expressive and more convenient mode by deed has been substituted by statute in this country without dispensing with any of the guards designed for the protection of married women. — *Id.*
3. **WHERE THE STATUTE REQUIRES THE HUSBAND TO JOIN WITH THE WIFE** in the execution of a deed to convey her lands, *held*, that a joint signing, etc., of the wife's deed was a sufficient assent to comply with the requirements of the statute. His assent to the act of his wife is all that the policy of the law requires, and this is signified by a joint signing. — *Id.*

MASTER AND SERVANT.

1. **GENERAL DOCTRINE THAT MASTER IS NOT LIABLE** for injuries caused by the negligence of a fellow-servant in the same common employment is now regarded as settled law. The reason assigned for this exemption is that by his contract of employment the servant assumes the risks incident to it, and that both he and his employer had them in contemplation in fixing the compensation. — *Anderson v. Bennett*, 515.
2. **GENERAL RULE AS DECLARED in *Farwell v. Railroad Co.*** that all servants employed by the same master, and working under the same control and in a common employment, are fellow-servants, has been the subject of much dispute

MASTER AND SERVANT (Continued).

as to its proper limitations, and in many of the States has been relaxed and modified in consequence of the hardships and injustice growing out of its too general application. — *Id.*

3. So THAT, the later current of judicial decision, as well as legislative action, indicates a marked departure from that rule, and a disposition to so limit and restrict it as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment. — *Id.*
4. MARKED CHANGE FROM OLD RULE is taking place in the law as to servants clothed with partial authority, only such as a foreman or superior servants, and the principle upon which such change is based is that when a master delegates any duty which he owes to his servants, he is liable for its proper performance. — *Id.*
5. GUIDED BY THIS PRINCIPLE, several tests have been applied in determining the line of demarcation between the representative of the master and the mere servant, and among them is the ruling that the master is chargeable for any act of negligence in so far as the servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing a reasonable safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils which may be guarded against by proper diligence, etc., and to the extent of the discharge of these duties which the master owes to his servant by the middle-man or vice-principal, the latter stands in the place of the master. — *Id.*
6. IT IS THEREFORE A DUTY which the master owes to every servant to provide a reasonably safe place at which to work, having reference to the nature of the undertaking, or the exigency of the situation, and although he is not an insurer he is bound on the same principle by the law to exercise due and proper care in this regard, as he is in hiring competent servants or in supplying reasonably safe machinery or other appliances for the use of his servants. — *Id.*
7. AS DEFENDANT WAS NOT PERSONALLY PRESENT and did not promulgate or establish any suitable or needful rules and regulations for the safe and proper conduct of the work, and as the direct management or execution of the work during his term was placed in charge of C., there necessarily devolved upon him the duties in this particular which the defendant owed to his servants; and as a consequence, it became the duty of C. to provide for the safety of the servants under his control and subject to his commands, by the exercise of such care in the management and conduct of the undertaking intrusted to him, as would render reasonably safe the place at which the employees must apply the machinery and do their work. — *Id.*
8. C. WAS THUS NOT ONLY THE FOREMAN to direct the work of the hands under him, but the person above all others to provide that they should have a reasonably safe place at which to work, consistent with the exigencies of the situation, and in this view it is of no importance by what name C. be called, whether a middle-man, superintendent, or foreman. — *Id.*
9. WHEN, THEREFORE, C. ordered the plaintiff to set up the machinery and drill holes at the place where the injury occurred, without having taken any care, or at least, adopted some precautionary measures to discover whether there were holes charged with giant powder which had failed to explode, and to guard against the danger of the drills penetrating them, etc., he committed a negligent or wrongful act, and exposed the plaintiff to a serious danger not contemplated by his contract of service. — *Id.*

MECHANICS' LIENS.

WHERE STATUTE which gave to mechanics and others a lien upon buildings and other structures for work done and material furnished in the construction thereof was repealed by another statute which also gave such lien, and provided that nothing contained therein should affect any lien theretofore acquired, but that the same should be enforced by the provisions of the repealing act; and parties had furnished such work and material during the existence of the repealed statute, and were engaged in furnishing such work and material at the time of the repeal, and continued thereafter so to do, and would have had such lien to the extent of the original contract price, or of any installment thereof, to become due thereon in accordance with the terms of the original contract, by giving written notices to the employer of the nature and extent of their claims against the original contractor; and the repeal of the former statute and adoption of the subsequent one took place before such an installment became due; *held*, that notwithstanding such written notice had not been given, the lien provided in the repealing act would, upon a compliance with its provisions, attach in favor of such parties to the extent of such installment. *Held, also*, that as the later statute had dispensed with the necessity of giving to the employer the written notice, the lien would attach without it. *Held*, that under section 5 of the act of the legislative assembly of the State, entitled "An act for securing liens for mechanics, laborers, material men, and others, and prescribing the manner of their enforcement," approved February 14, 1885, parties claiming the benefit of said act, on account of labor performed or material furnished in the construction of a building, except the original contractor, were only required to file their claims within thirty days after the completion of the building, when the labor was performed or material furnished for the purpose of completing it. *Held*, that requiring a claim to be filed containing a true statement of the demands as provided for in said section 5 is not to be construed as necessarily meaning an itemized statement; nor that the provision in said section 5, requiring to be filed a claim containing a true statement of the demand, "after deducting all just credits and offsets," is to be construed as meaning that the statement shall contain those veritable words; nor that the requirement in said section 5 that the claim shall be verified by oath of the claimant, or some other person having knowledge of the facts, is to be construed as meaning that such verification shall be signed by the claimant or such other person, and that if the statement of the demand was true as a matter of fact, and was shown to have been verified by the oath of the claimant or other person having knowledge of the facts before an officer authorized to administer an oath, it would be entirely sufficient. — *Ainslie v. Kohn*, 863.

MORTGAGES.

1. **CHATTEL MORTGAGE DEFINED.** — A chattel mortgage is the conditional sale of a chattel, to be void upon the performance of the condition named therein. — *Hembree v. Blackburn*, 153.
2. **CHATTEL MORTGAGE—FUTURE ADVANCES.** — A chattel mortgage may be made to secure future advances, but if no advances be made under such mortgage, it cannot be enforced by the mortgagee. — *Coffin v. Taylor*, 375.
3. **SAME.** — As between the parties to such mortgage, if no advances be made, it never becomes a lien on the property described therein for any sum because there was nothing due, and an attempted sale of the property by the mortgagee, and purchase thereof by him, does not divert the title of the mortgagor. — *Id.*
4. **MORTGAGEE'S NAME LEFT BLANK.** — An instrument purporting to be a mortgage, but containing the name of no mortgagee, cannot be rendered valid by

MORTGAGES (Continued).

- filling in of the name of a mortgagee by an agent to whom the mortgagor had delivered the paper, with instructions to fill in the blank and obtain money from whomsoever would take it and advance the money thereon. — *Shirley v. Burch*, 83.
5. **DELIVERY.** — Where the person named as payee in a note and accompanying mortgage never had any interest in the same and knew nothing of the transaction, and the said papers were not delivered to him but were delivered to another; *held*, that the mortgage was void for lack of delivery. — *Id.*
 6. **FICTITIOUS PERSON NAMED AS MORTGAGEE.** — Where the evidence disclosed that a person of the same name as the mortgagee named in the mortgage lived in the city where the loan was negotiated, but that such person disclaimed any knowledge of or connection with the transaction; *held*, that the payee and mortgagee are fictitious. — *Id.*
 7. **FORECLOSURE.** — A court of equity will not decree foreclosure of a mortgage void in law for want of a proper mortgagee, even though the plaintiff has been imposed upon by fraudulent acts of a broker, and all the acts of the plaintiff were in good faith. — *Id.*
 8. **STATUTE — LIEN BY MORTGAGE.** — Section 414 of Hill's Code provides for the foreclosure of a lien created by mortgage by a suit in equity, which jurisdiction is vested in the Circuit Courts. — *Verdier v. Bigne*, 208.
 9. **FORECLOSURE — POWER OF COUNTY COURTS.** — Upon condition broken, and the death of the mortgagor, the County Court does not acquire the jurisdiction to afford the mortgagee the relief to which he is entitled. — *Id.*
 10. **FINDING — ATTORNEY'S FEES — EXCEPTIONS.** — In a foreclosure suit which is tried by the court under section 397 of Hill's Code, a finding by the court in favor of the plaintiff of an amount for attorney's fees is a finding of fact, and will not be reviewed on appeal from the decree, unless the same be excepted to in the court below. — *Id.*
 11. **DECREE — HOW REVIEWABLE.** — In such cases, section 543 of Hill's Code makes the decree reviewable on appeal *only* as to questions of law appearing on the transcript, and shown by the bill of exceptions. — *Id.*

See PARTNERSHIP.

MUNICIPAL CORPORATIONS.

1. **CHARTER OF DALLAS CITY — POWER OF COUNCIL — SEWERS.** — Section 63, Acts of 1880, page 1, incorporating Dallas City, confers upon the common council of the city power without limit or restriction to establish a system of sewerage, and to construct and repair drains and sewers. — *Beers v. Dallas City*, 334.
2. **STATUTORY CONSTRUCTION — SECTIONS 63 AND 91.** — These sections relate to the same subject and must be construed together. Under section 63 the council might exercise the power in any suitable manner, and the expense would be payable out of the general fund of the city; but section 91 enables the council in its discretion to charge the costs of drains and sewers upon the property directly benefited. If the council fail to exercise this discretion and to charge the expense on the property, it is payable out of the general fund. — *Id.*
3. **POWER — HOW EXERCISED.** — When the common council of a municipal corporation is vested with full power over a subject, and the mode of the exercise of such power is not limited by the charter, it may exercise it in any manner most convenient. In such case the corporation may act by its officers or properly authorized agents, and make contracts to carry into effect the granted powers the same as individuals. — *Id.*

MUNICIPAL CORPORATIONS (Continued).

4. **LIABILITY.** — Unless prohibited by its charter, a municipal corporation is liable when a person is employed for it by one assuming to act in its behalf, and such person renders the services according to the agreement, with the knowledge of its officers, and without notice that it is not recognized as valid and binding. — *Id.*
5. **SECTION 128 OF THE CHARTER — ORDINANCE — CONTRACT IN WRITING.** — The application of this section is limited to those cases where the power of the corporation must be exercised by ordinance under the charter, and where the work must be let to the lowest responsible bidder after notice. It does not apply to cases where the council is directly authorized to do the work without the formality of entering into an express contract. — *Id.*
6. **CHARTER — CONSTRUCTION OF THE TERM "CONTRACT."** — The term "contract," used in section 128 of the charter of Dallas City, must be construed to mean such contracts as are named in other sections of the charter, when an ordinance and notice are necessary prerequisites to create a legal liability against the city. — *Id.*
7. **SEWERS — COLLECTION OF ASSESSMENTS.** — Where the common council of the city of Portland, by ordinances duly adopted, caused a certain sewer in the north part of the city known as Tanner Creek Sewer to be constructed at a cost of over thirty-five thousand dollars, which it directed to be assessed on property it declared to be directly benefited thereby under the authority contained in section 121 of the city charter, *providing*, "that the common council of the city shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such sewer or drain, and to estimate the proportionate share of cost thereof to be assessed to the several owners so benefited." *Held*, in a suit brought by a number of the owners of the property to enjoin the collection of the assessments, upon the grounds of the charter not requiring notice of the proposed construction of such works to be given, and of the assessment having been arbitrarily levied without regard to the value of the benefits conferred by the improvement, that such owners were properly united as plaintiffs in the suit, if such ordinances were void. That although the interests of such owners were distinct, that they differed in extent, and were not similarly affected, yet the cause being common to them all, and each having the same character of remedy, they had a sufficient community of interest to entitle them to join as such plaintiffs. *Held*, however, following the decision of this court in *Strowbridge v. City of Portland*, 8 Or. 67, which the court under the particular circumstances of this case regards itself as bound to do, that the failure of the charter to require such notice to be given does not render section 121 void; nor do the proceedings had under it have the effect to deprive such owners of their property "without due process of law." *Held*, that where a question has been decided by this court, and parties, relying upon the decision as a settled rule of law, have transacted important affairs which would be seriously affected by a change of the rule, the court will adhere to it in subsequent cases, however it might be inclined to hold if the question were *res integra*. *Held*, that the assessment of a proportionate share of the cost of a local improvement by the officers of a municipal corporation, upon parties specially benefited thereby, cannot be made in excess of the value of the benefit conferred; but where the improvement directly benefits the property of such parties, the question of the extent of the value thereof must be determined by the proper officers of the corporation. The courts will not interfere in such a case, unless the property assessed is so situated as to render it physically impossible for the improvement to benefit it; or where the mode of levying the assessment excludes the consideration of the question of value of the improve-

MUNICIPAL CORPORATIONS (Continued).

ments. *Held*, that as said section 121 of the city charter of the city of Portland only empowers the common council of the city to lay down necessary sewers and drains, it is a limitation upon the power of the council to establish the same, unless the benefits to the property accommodated thereby will be equal to or in excess of the cost of their construction. *Held*, that where an assessment is levied upon property for a share of the cost of a local improvement, which is so situated that it cannot possibly be benefited thereby, the owner of the property may maintain a suit to prevent the enforcement of the assessment; but that different owners of distinct parcels of property so assessed have no right to join as plaintiffs in such suit.—*Paulson v. Portland*, 450.

See INJUNCTIONS.

MURDER. See CRIMINAL LAW, 5-9.

NEGLIGENCE. See MASTER AND SERVANT.

NEGOTIABLE INSTRUMENTS.

PROMISSORY NOTE—CONSIDERATION—BURDEN OF PROOF.—A promissory note imports a consideration. Whoever alleges that a promissory note is without consideration has the burden of proof.—*Flint v. Phipps*, 487.

NOTICE.

1. SECTION 3384 OF THE CODE—"KNOWING."—The word "knowing," as used in this section, does not imply exact knowledge. It is such information as would lead a prudent man to believe that the fact existed, and if followed by inquiry must bring knowledge of the fact home to him.—*Tucker v. Constable*, 407.
2. NOTICE—KNOWLEDGE.—Information which a prudent man believes, or has reason to believe, to be true, and which if followed by inquiry must lead to knowledge, is equivalent to knowledge. Where the rights of others are concerned, a man possessed of such information must not shut his eyes.—*Id.*

See PLEADING AND PRACTICE, 5.

OFFICE AND OFFICERS.

1. DISTRICT ATTORNEY—FEES OF—ALLOWANCE OF, BY CIRCUIT COURT.—It is the duty of the respective Circuit Courts at each term thereof to ascertain the fees to which the district attorney is entitled for the term, and direct an order to be entered upon the journal that the same be paid.—*Colvig v. Klamath County*, 244.
2. BAIL BOND—FORFEITURE OF—PAYMENT BY SURETIES—DISTRICT ATTORNEY—FEES FOR COLLECTING—WHEN ALLOWED.—Where a defendant in a criminal action, who had been admitted to bail, failed without sufficient excuse to appear for arraignment, and the undertaking of bail was declared forfeited, and the sureties therein consented that judgment for the amount thereof be rendered against them at the time the forfeiture was declared, and they paid the amount to the district attorney, who paid it over to the treasurer of the county entitled thereto, and filed a receipt therefor with the county clerk of the county; *held*, that it was not error for the Circuit Court in ascertaining the fees to which the district attorney was entitled for the term, to allow him ten per centum on such amount so received and paid over.—*Id.*

OFFICE AND OFFICERS (Continued).

3. ORDER OF COURT, APPEALABLE — WHAT IS. — *Semble*, per THAYER, J. — An appeal to this court from an order in such case is not provided for in the Code. Such order is not an order affecting a substantial right, and which in effect determines an action or suit so as to prevent a judgment or decree therein, or a final order affecting a substantial right, and made in a proceeding after judgment or decree. (Per LORD, C. J., concurring.) — *Id.*

PARENT AND CHILD. See ESTATES OF DECEDENTS; FRAUDULENT CONVEYANCES; MARRIAGE AND DIVORCE, 1, 2; WILLS, 9.

PARTNERSHIP.

1. PARTNER — POWER TO MORTGAGE CHATTELS OF THE FIRM TO SECURE PARTNERSHIP DEBTS. — One member of a firm has the authority to mortgage the chattels of the partnership to secure the payment of partnership debts, without the knowledge or consent of the other members of such firm. — *Hembree v. Blackburn*, 153.
2. THE JURISDICTION OF EQUITY to correct a mistake in the settlement of partnership accounts has been often exercised, and cannot be disputed. But in cases involving mistakes, arising from an alleged want of proper diligence, the jurisdiction will, in a great measure, depend upon the particular facts and circumstances. — *Powell v. Heisler*, 412.
3. PARTNERSHIP SETTLEMENT. — Where a claim arising from a mistake asserted by one party and denied by the other in good faith, and the parties by mutual consent select a mode of settlement, and both act upon it, and there was at the time no inequality of footing, or means of knowledge as to the facts, nor any fraud or undue advantage or mistake made by those to whom such disputed matter was committed; *held*, that in view of all the facts a case for relief was not presented. Where a mistake is alleged, the proof of it ought to be clear and satisfactory. — *Id.*
4. PARTNERSHIP ACCOUNTING — DUTY OF PARTNER KEEPING ACCOUNTS AND HANDLING FUNDS. — Where it appears that the defendant kept all the books of a firm and kept the bank account of the firm in his own name, *held*, that this imposed upon him the duty of making a full and complete showing of all the affairs of the firm, and of demonstrating every item of account so clearly as to leave no question about the same. — *Rohr v. Pearson*, 325.
5. PATENT RIGHTS — USE OF, IN FIRM'S BUSINESS — NO IMPLIED CONTRACT TO PAY. — Where the defendant claimed an allowance for the use by the firm of certain patent rights, and the utility of the same is in doubt, and it appears that he voluntarily made use of them in occasional business of the firm without any understanding or expectation that he should be paid for the same, the claim was disallowed. — *Id.*
6. ACCOUNTS — ALTERATION OF, AFTER SUIT. — Where the defendant after the commencement of the suit made an additional charge for time lost in the business of the firm to what had been by him previously charged on the books of the firm for the same loss, *held*, that it was properly disallowed. — *Id.*
7. PARTNERS — SALE OF PARTNERSHIP INTEREST BY ONE — EFFECT OF. — A sale by one partner of his interest in a concern dissolves it; and the assignee or purchaser becomes a tenant in common with the other partners, and such assignee or purchaser may maintain a suit for an accounting against the other partners, and the persons to whom they have transferred their interest. — *Marz v. Goodnough*, 23.

PATENTS. See PARTNERSHIP, 5.

PLEADING AND PRACTICE.

1. DEATH OF DEFENDANT—ACTION CONTINUED AGAINST PERSONAL REPRESENTATIVE.—If a party to an action die and the cause of action survive, the adverse party may at any time within one year thereafter cause the action to be continued by or against the personal representative of such deceased party.—*Mitchell v. Schoonover*, 211.
2. PLEADING—CONSTRUCTION.—In the construction of a pleading, the ordinary rule is that it is to be construed most strongly against the pleader.—*Pursel v. Deal*, 295.
3. PLEADING—MATERIAL FACT NOT ALLEGED.—An answer constitutes a part of the record on appeal, and on demurrer its sufficiency must be determined by the facts set forth, and it cannot be aided or supported by extrinsic facts.—*Beers v. Dalles City*, 334.
4. BONDS, JOINT—MAKERS OF—ACTION AGAINST—FAILURE OF SOME TO APPEAR—JUDGMENT.—Several parties executed a joint bond and were jointly sued on the same. One appeared and answered for all. Subsequently some of them withdrew their appearances, and the court rendered judgment against those withdrawing. Held, that the judgment was improperly granted and should be vacated on motion of the plaintiff.—*Wilson v. Blakeslee*, 43.
5. MOTION—NOTICE OF—WITHDRAWAL OF APPEARANCE—EFFECT OF.—Where a defendant entered his appearance and afterwards withdrew the same, held, that section 530 of Hill's Code was applicable to his case, and that no notice upon him of the after proceedings therein was requisite.—*Id.*
6. PRACTICE—JURY, INSTRUCTION TO.—Trial courts should not instruct juries by reading to them an opinion of another court. If they desire to adopt such an opinion as the law of the case, they should copy from it and deliver the portions applicable.—*Stewart v. Hunter*, 62.

See ATTACHMENT AND GARNISHMENT; CORPORATIONS; CRIMINAL LAW; EJECTMENT; EVIDENCE; JUDGMENTS; LANDLORD AND TENANT; PROCESS.

PROCESS.

SUMMONS—PUBLICATION.—“If a cause of action exist against the defendant,” and the other requisite facts mentioned in section 56 of the Code, the court or judge may order a summons to be served by publication.—*Pursel v. Deal*, 295.

See EXECUTIONS.

PUBLIC LANDS.

1. CONGRESSIONAL GRANT TO AID IN THE CONSTRUCTION OF O. & C. R. R. LAND “PRE-EMPTED.”—By the terms of the Act of Congress of July 25, 1886, granting lands to aid in the construction of the O. & C. Railroad, lands on odd sections within the twenty-mile limit which had been *pre-empted*, did not pass to the company by the terms of the grant, but were excepted out of such grant.—*Brown v. Corson*, 388.
2. EVIDENCE—PRE-EMPTION.—A paper certified by the register of the land office to be a correct copy of the form of pages 160 and 161 of the register of declaratory statements on file in said office, and which is headed, “Register of declaratory statements under Act of Congress of September 4, 1841, and amendments thereto,” and which contains a description of the land in question, etc., is not sufficient

PUBLIO LANDS (Continued).

proof that the land described therein had been *pre-empted* at the time the railroad grant attached. — *Id.*

3. **PRE-EMPTION — HOW ACQUIRED.** — A pre-emption is a right derived wholly from statute, and a substantial compliance with the statute is necessary to its acquisition, which compliance must be shown by competent evidence. — *Id.*

4. **SAME — WHAT EVIDENCE NECESSARY TO PROVE.** — The evidence offered must show that the conditions existed which would enable the pre-emption, or to acquire the land under the law, and that he had performed at least enough to give him some inchoate right to the land. — *Id.*

5. **SCHOOL LANDS.** — A person who has purchased from the board of commissioners for the sale of school and university lands, under the act of the legislative assembly of the State, providing for the selection, location, and sale of State lands, etc., approved October 18, 1878, the *maximum* quantity of land he was authorized to purchase under the act, is not thereby disqualified from taking an assignment of a certificate of purchase issued by the board to an applicant under the act, nor from receiving a deed from the board for such land in his own name. — *Ghem v. Board of Commissioners*, 479.

6. **SCHOOL LANDS, SALE OF — HOW EFFECTED.** — Where one K. held a certificate from said board of commissioners for the purchase of one hundred and sixty acres of land, under the act above referred to, and assigned the same to G., and G. after the assignment to him made full payment to the board of the amount of the purchase price unpaid, and delivered to the board such certificate and assignment, *held*, that G. was entitled to a deed from the board to the land in his own name, notwithstanding it appeared from the records of the board that a deed had theretofore been executed to him for the full amount of land, which he was entitled to apply to purchase under the act. *Held, further*, that a sale under the act consisted of the application to the board to purchase such quantity of the land as the applicant was entitled to apply to purchase, the payment of the proportion of the purchase price thereof, the execution of the promissory notes for the balance of the purchase price, as provided in the act, and the execution to the applicant of the certificate of purchase, and that the limitation upon the quantity of the land a party was entitled to purchase under the act only applied to such sale, and not to the purchase or assignment of a certificate of sale from the party to whom the same had been issued. — *Id.*

7. **PUBLIC LANDS — DONATION OF SWAMP LANDS — CONFLICTING TITLES — REMEDY AT LAW.** — The Act of Congress of March 12, 1860, "to extend the provisions of an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, to Oregon and Minnesota," was a grant *in present* to the latter States of land that was in fact swamp land at the date of the act; and a party claiming such land under a patent from the State of Oregon has a complete remedy at law against one claiming under a patent from the government; and a suit at equity by the former against the latter to compel the conveyance of the latter's title to the former will, for that reason, be denied. — *Miller v. Tobin*, 540.

RAPE. See CRIMINAL LAW, 14, 15.

RECEIVERS. See LANDLORD AND TENANT, 1.

REPLEVIN.

1. IT IS NOT NECESSARY in a complaint in replevin to describe specifically the character of the property, as that it is exempt from sale upon execution, any more than it is an action of trespass or trover. — *Krause v. Herbert*, 429.

REPLEVIN (Continued).

2. **ALLEGATIONS ON.**—The cause of action is complete without any statement of the reason or authority for taking the property and its exemption. Such allegations are no part of the gist of the cause of action, and are not necessary to be proved in the first instance to entitle the plaintiff to recover. — *Id.*
3. **REPLEVIN.**—When in an action of replevin the plaintiff had simply proved orally that his agent had sold a machine and taken an old one in part payment, and was content thus to establish his title to it, the defendant had the right to meet and rebut this, by showing upon the case made that there was an implied obligation which the law imposed to furnish a machine reasonably fit to serve the purposes to which it was to be applied, and that the plaintiff had not performed such obligation when he had delivered a machine that would not do ordinary good work. — *Case Threshing Machine Company v. Smith*, 381.
4. **SAME.**—Where to obviate this the plaintiff procured such order or contract to be admitted as part of the evidence of the defendant and against his objection, in order to avail itself of the benefit of its provisions and to deny the debt, the provisions in his favor on account of his failure to settle on delivery did not relieve the plaintiff of proving that he furnished the machine ordered, and which was reasonably fit for the purpose intended, or the defendant of showing his non-compliance therewith, because such undertaking was a part of the contract precedent, to be performed by the plaintiff before any obligation devolved upon the defendant under such contract. — *Id.*
5. **CONDITION PRECEDENT.**—The reason is that such facts constitute a part of the contract of sale itself, and operate as a condition precedent and not as a warranty or agreement collateral to the sale. — *Id.*
6. **DAMAGES.**—In an action of replevin, if the plaintiff prevails, he is entitled to recover damages for the wrongful taking and detention of the property from the time when taken to the rendition of the judgment. — *Coffin v. Taylor*, 373.
7. **MEASURE OF DAMAGES.**—The jury may consider the nature and character of the property in controversy, and if the plaintiff prevails in the action award him such damages as the use of the property was worth during the time of the detention. — *Id.*

RES ADJUDICATA.

SECOND APPEAL—LAW OF THE CASE.—Upon a second appeal, if the facts are the same, the former opinion is the *law of the case*, and must govern it in all of its subsequent stages. — *Thompson v. Hawley*, 251.

REWARDS.

BRIBERY—REWARD FOR CONVICTION OF.—The County Court for the county of Multnomah, at the May term thereof, 1896, made an order that a reward of two hundred and fifty dollars be offered for information leading to the conviction of any person who might be guilty of bribery at the coming election in June. M. claimed that he gave information which led to the conviction of W. and C. in the United States court, district of Oregon, for bribing P. at said election, and demanded five hundred dollars reward. *Held*, that the County Court had no authority to make such order. *Quare*, whether the respondent's petition to the County Court contained sufficient facts to entitle him to the reward claimed, even if the offer had been legal; whether the County Court did not intend by the offer of the reward a conviction in the courts of the State for a violation of its statutes; and whether a conviction in a United States court for the violation of any act of Congress would be a compliance with the terms of the offer. — *Mountain v. Multnomah County*, 279.

RIPARIAN RIGHTS. See WATERS.

SALES.

PERSONAL PROPERTY—SALE OF, WHEN LEASED—EFFECT OF.—The sale of a band of sheep leased by the owner to W. does not *per se* transfer to the purchaser such lease, nor the right to any advances made by the lessor to the lessee. (Following *Beezley v. Crossen*, 14 Or. 473.)—*Beezley v. Crossen*, 72.

See PARTNERSHIP, 7.

SEWERS. See MUNICIPAL CORPORATIONS.

SHERIFFS.

SHERIFF—NO LIABILITY FOR KEEPER'S SERVICES, WHEN.—By the employment of a keeper, a sheriff does not make himself personally responsible for his wages unless he shall expressly agree to pay the same. He acts for the benefit of the plaintiff in the writ, who may be called upon to advance the wages of a keeper. — *Hawley v. Dawson*, 844.

See EXECUTIONS.

SPECIFIC PERFORMANCE.

COMPENSATION IN DAMAGES.—When the defendant inherited an equitable interest in lands, and was entitled to have his title perfected upon the payment of one hundred and sixty dollars, and then sells said lands for eighteen hundreds dollars, and agrees to *perfect the title* and refuses to do it, the purchaser may elect to specifically enforce the agreement by acquiring the defendant's equity through the decree, and have compensation in damages for the amount necessary to be paid to perfect the title. — *Thompson v. Hawley*, 251.

STATUTE OF FRAUDS.

1. **PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.**—The objection that the contract sued on is an agreement to answer for the debt of another, and that it must be evidenced by writing, must be presented by an exception to the ruling of the court below either in the admission or exclusion of evidence, or the giving or refusing instructions, or by a demurrer in a proper case. — *Hawley v. Dawson*, 844.
2. **EVIDENCE OF ACCEPTANCE** and receipt of a part of the property, under a parol agreement for the sale of personal property for the price of fifty dollars or upwards, when no part of the price was paid at the time of making it, though insufficient to preclude the defendant from claiming that the agreement had not been fulfilled, and its terms complied with, yet may be sufficient to answer the requirements of the Statute of Frauds in that particular. — *Meyer v. Thompson*, 194.
3. **WHERE T. D. & Co.** made a parol agreement to purchase from M. W. & Co. a cargo of the best Lancashire steam coal, then on board of a certain vessel bound to P., at a certain price per ton, amounting to several thousand dollars, and M. W. & Co., in an action against T. D. & Co. for damages for refusing to take and pay for the coal in accordance with the agreement, gave evidence tending to show that when the vessel arrived at P. with the coal on board, an agent of the plaintiffs telephoned from their place of

STATUTE OF FRAUDS (Continued).

business to the defendants, at their place of business, notice of its arrival, and inquired of them where they wished to have the coal, and the defendants answered, that if the vessel could discharge it where she was without incurring expense or charge to them, they would take it there, but if not, to send the vessel up to their dock; and in pursuance of which the plaintiffs sent the vessel to their dock, which their dock-master had prepared to receive the coal, and discharged thereon thirty or forty tons of the coal; and the defendants' drayman, whom they had instructed the previous night to be at the dock the next morning, when the coal was expected to arrive, to haul it, took from eleven to fifteen tons of the coal to defendants' coal yard, back on another street, which their yard-master by their order had prepared to receive it; that the defendants did not see the coal, or come to the dock where it was being discharged, until after a considerable portion of the thirty or forty tons had been discharged, and the eleven to fifteen tons had been hauled over to the coal yard, and then refused to receive it. *Held*, that the evidence if accredited by the jury would have justified them in finding that there had been such a delivery and acceptance of a part of the coal under the agreement as would take it out of the Statute of Frauds; and that the court should have instructed the jury that if they found the state of facts which such evidence tended to prove, they should find the agreement valid. — *Id.*

STATUTE OF LIMITATIONS.

1. WHEN ONCE COMMENCED TO RUN, NOT STOPPED OR ARRESTED. — The rule is of almost universal application, that when the Statute of Limitations is set in motion, or commences to run, it will not cease to be arrested by any subsequent event not within the saving clause of the statute. — *Northrop v. Marquam*, 174.
2. UNDER LEASE CONTAINING a clause for the purchase of the demised premises within a specified time, the Statute of Limitations does not commence to run against an action for waste until the privilege is extinguished by lapse of time. *Powell v. Dayton etc. Railroad Company*, 83.
3. INFANCY. — Section 17 of the Code, as amended in 1878 (Hill's Code, § 17), repealed the exception of infancy in that section, thus placing all of the disabilities mentioned therein on the same footing. — *Northrop v. Marquam*, 173.
4. INFANT — TIME WITHIN WHICH HE MAY SUE TO RECOVER REAL PROPERTY. — An infant has fifteen years after a cause of action accrues to him in which to sue to recover his lands, unless he should become of age after the ten years have elapsed and before the expiration of five years thereafter, in which case the time for the commencement of the action would be one year after the disability ceased. *Id.*

See COTENANCY.

STATUTES.

1. REMEDIAL STATUTE — CONSTRUCTION. — Section 3384 of the Code concerning estrays being a remedial statute it ought to be liberally construed, for the purpose of remedying the evil against which it is directed, and of accomplishing the intent of the legislature. — *Tucker v. Constable*, 407.
2. CONSTITUTIONAL LAW — TITLE TO ACT — STATUTES — AMENDMENTS. — An act entitled "An act to amend section 14 of title 1 of chapter 28, General Laws of Oregon, . . . as amended October 17, 1876," is not repugnant to the Constitution,

STATUTES (Continued).

article iv., section 20, which provides that "every act shall embrace but one subject and matters connected therewith, which subject shall be expressed in the title," when taken in connection with article iv., section 23, of said instrument, which provides that "no act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at length."—*State v. Phenix*, 107.

3. **SAME—INTOXICATING LIQUORS—SALE OF, TO MINORS.**—An act of the legislature, entitled "An act to prohibit the selling or giving of intoxicating liquors to minors, without the written consent of parents or guardians," Laws of 1874, section 686, as amended in 1877, makes the prohibition to "sell or give intoxicating liquors to minors" absolute under article iv., section 20, *supra*.—*Id.*

SUNDAYS. See **CRIMINAL LAW**, 1.

TAXATION.

1. **VERIFIED LIST OF TAXABLE PROPERTY—HILL'S CODE, SECTION 2769.**—The verified list required under this section to be furnished the assessor by a tax-payer does not constitute an assessment when received by the assessor. It simply aids him in obtaining a true description of taxable property, and is evidence from which the assessment may be made.—*Oregon & W. M. S. Bank v. Jordan*, 118.
2. **ASSESSMENT—WHAT IS.**—Property is not assessed though on a verified list until it is set down in the assessment roll as required by section 2770 of Hill's Code.—*Id.*
3. **BOARD OF EQUALIZATION—ITS POWERS AND DUTIES.**—The board of equalization, in making the proper corrections under section 2779 of Hill's Code, may place on the assessment roll property of a tax-payer which had been omitted by the assessor, or not assessed, and this without the three days' notice to such tax-payer. Notice is requisite only when the valuation of property already assessed is raised.—*Id.*
4. **JURISDICTION OF EQUITY.**—Before equity will interfere to enjoin the collection of a tax, the facts presented must disclose a case falling under some recognized head of equity jurisdiction, such as the preventing a multiplicity of suits, removing cloud from title, or the like, or it seems illegality of the tax.—*Id.*
5. **ASSESSOR—ACTS JUDICIALLY IN VALUATION OF PROPERTY,** and their determinations, are binding in cases where they have jurisdiction, until reversed or set aside by some tribunal having authority to review their action.—*Id.*
6. **REMEDY OF TAX-PAYER.**—The remedy of the tax-payer in all ordinary cases for errors in his assessment is to go before the board of equalization, and failing to obtain redress, to seek it by writ of review. (*Rhea v. Umatilla County*, 2 Or. 296, and *Poppleton v. Yamhill County*, 8 Or. 338, approved.)—*Id.*

See **JURY AND JURORS**, 5; **MUNICIPAL CORPORATIONS**.

TRUSTS. See **DEEDS**, 7.

VERDICT.

VERDICT—EFFECT OF.—A verdict conclusively settles every issue in favor of the party in whose favor it is rendered.—*Woods v. Courtney*, 121.

See **APPEALS**.

WASTE. See **LANDLORD AND TENANT**; **STATUTE OF LIMITATIONS**, 2.

WATERS.

1. **WATER-COURSE — RIGHTS OF CONTERMINOUS PROPRIETORS AS TO SURFACE WATER NOT DECIDED.** — The authorities on the subject are not harmonious, and the facts not rendering it necessary, the question not determined. — *West v. Taylor*, 165.
2. **SURFACE WATER — WHAT NOT.** — The water flowing out of Cullaby Lake and seeking an outlet by the Skipanon is not *surface water*. — *Id.*
3. **WATER-COURSE — WHAT IS — DOES NOT CEASE TO BE, BY SPREADING.** — A stream does not cease to be a water-course and become *mere surface water* because at certain points it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel. — *Id.*

WILLS.

1. **WILL CAPACITY — PRESUMPTION.** — When a will is shown to have been duly executed, there arises a presumption of sanity in favor of the testator, which, at this stage of the proceedings, unless rebutted or overcome by counter-evidence, will be sufficient to authorize the probate of the will. — *Chrisman v. Chrisman*, 127.
2. **INSANITY — BURDEN OF PROOF.** — When in a civil proceeding the question of sanity and insanity is directly in issue, while giving to the general presumption in favor of sanity all that may fairly be claimed for it, the burden of proving sanity is upon the party who asserts it. — *Id.*
3. **TESTAMENTARY CAPACITY.** — Testamentary capacity is mainly a question of fact, to be determined from a consideration of all the evidence. The testator must have sufficient capacity to comprehend the conditions of his property, his relation to the persons who were, should, or might have been the objects of his bounty, and the scope and bearings of the provisions of his will. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of. Old age, sickness, distress, nor debility of body do not incapacitate, provided the testator has possession of his mental faculties and understands the business in which he is engaged. The real point in issue is testamentary capacity or incapacity at the precise date of the transaction. What his mental condition was before and after executing the will is only important, as it throws light upon his mind, and shows its actual condition when the will was executed. — *Id.*
4. **POWER TO MAKE.** — The law gives to every man of sound mind the right to dispose of his property by last will, and this is regarded as one of the most efficient means which he has in protracted life or old age to command the attention due to his infirmities. — *Id.*
5. **CHILD NOT NAMED OR PROVIDED FOR.** — The will may be valid and effectual as to all the children named or provided for therein, but as to those not named or provided for, it is no will, and such child or children will take under the law of descents in all respects as if no will had been made. — *Northrop v. Marquam*, 173.
6. **POSTHUMOUS CHILD — DESCENT.** — A child *in ventre sa mere*, not named or provided for in its father's will, takes by inheritance its proportionate interest in its father's estate. — *Id.*
7. **SALE OF PROPERTY BY EXECUTION.** — Under section 1155, when a testator makes provisions in his will for the sale of land of which he died seised, the executors may sell the same by virtue of the power conferred by the will; but such sale

WILLS (Continued).

must be reported to the County Court, and confirmed as in other cases of sales of real property by executors and administrators.— *Id.*

8. SALE BY EXECUTORS.—In case of a child or children not named or provided for, a sale by the executors under the will transfers to the purchaser all that the executors could lawfully sell; but the interest of such child or children not named or provided for being excepted out of the will by the statute, remains unaffected by such sales.— *Id.*
9. EQUITABLE CONVERSION.—A will which directs the sale of the real estate of the testator by the executors, does not work an equitable conversion of the interest of a child or children not named or provided for by the will.— *Id.*

See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS.

WITNESSES.

1. EXAMINATION OF—JUROR.—On a former trial for larceny, S., a co-defendant, was acquitted, the jury disagreeing as to the appellant herein. S. was a witness in said former trial, and pending the re-trial of the appellant, S. died. H. was a juror on the first trial, and in the second trial was called to prove the statements sworn to by S. in the first trial. On cross-examination the court allowed the district attorney to ask the witness, under proper objections, if he did not hang the first jury for thirty-six hours, and other questions touching his conduct as a juror in said cause. *Held*, error.— *State v. Huffman*, 15.
2. IMPEACHMENT.—Before a party against whom a witness is called can impeach him by proving contradictory statements of the witness, he must, while the witness is on the stand, call his attention to such statements, reminding him of the time, place, and persons present, and give him an opportunity to explain them.— *State v. Hunsaker*, 497.

WRIT OF REVIEW. See JUSTICES OF THE PEACE, 2; TAXATION, 6.

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